(19,075)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 120.

GIOVANNI LAVAGNINO, PLAINTIFF IN ERROR,

vs.

EDMUND H. UHLIG, ALEXANDER McKERNAN, AND THE ST. JOE MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

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a In the District Court of the Third Judicial District in and for the County of Salt Lake, State of Utah.

C. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN, Defendants.

Appeal from the district court of the third judicial district in and for the county of Salt Lake, State of Utah, before the Honorable William C. Hall, judge.

Appearances.

For the plaintiff. N. W. Sonnedecker, and C. C. Dey.
For the defendant. Albert W. Casey, Pierce, Critchlow and Barrette Brown and Henderson.

1 In the District Court of the Third Judicial District of Utah in and for the County of Salt Lake.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN, Defendants. } Complaint.

The plaintiff above named complains of the said defendants and alleges and shows to the court, that the plaintiff did on the 23rd day of August, A. D. 1880, declare his intention to become a citizen of the United States in the fourth district court of Colorado, sitting at Leadville, Lake county of said State.

That prior to the second day of January, 1898, the plaintiff was, ever since has been and now is, the owner (subject only to the paramount title of the United States) and in the possession and entitled to the possession of that dertain mine and mining claim, containing a lode of rock in place bearing silver and other precious metals, situated in West Mountain mining district, Salt Lake county and State of Utah, called the "Yes You Do" mining claim; and more particularly described as follows:

Commencing from post No. 1, a corner of the claim, thence N. 60 deg. 11′ E. 1034, 3 feet to corner No. 2; thence N. 39 deg. 03′ E. 384 8/10 feet to corner No. 3; thence S. 35 deg. 30′ E. 600 feet to corner No. 4; thence S. 54 deg. 30′ W. 1400 feet to corner No. 5; thence N. 35 deg. 30′ W. 600 feet, to corner No. 1, the place of beginning of surface bounds.

The presumed course of the lode of said claim from the discovery point thereof bears N. 36 deg. 59′ E. 356.1 feet to a point on the north-easterly end line and S. 60 deg. 16′ W. 1065.8 feet to a point on the south-westerly end line.

2 Said claim containing a total area of 15.989 acres.

That the defendants claiming to be the owners of alleged adjacent mining claims called the Uhlig No. 1 and Uhlig No. 2, on or about the 1st day of July A. D. 1898, wrongfully caused said alleged Uhlig No. 1 and Uhlig No. 2, mining claims to be so surveyed as to cross upon and overlap the "Yes You Do" mining claim and lode, and include a portion thereof as follows:

Conflict with Uhlig No. 1 Lode claim survey No. 3683. Commencing at corner No. 5 of the "Yes You Do" Lode claim; thence along the southwesterly end line of this claim N. 35 deg. 30′ W. 376 1/10 feet to point of intersection with the westerly end line of the "Uhlig No. 1 Lode claim; thence along this end line N. 20 deg. 12′ W. 54 3/10 feet to corner No. 4 of the "Uhlig No. 1" Lode claim; thence along the northerly side line of this claim S. 72 deg. 46′ E. 1145 3/10 feet to corner No. 1 of this claim; thence along the easterly end line of this claim S. 20 deg. 12′ E. 72 1/10 feet to point of intersection with the southeasterly side line of the "Yes You Do" Lode claim; thence along this side line S. 54 deg. 30′ W. 1083 feet to corner No. 5 of this claim, the place of beginning of surface bounds. Containing 6.374 acres.

Conflict with "Uhlig No. 2 Lode claim survey No. 3684. Commencing at corner No. 4 of the "Yes You Do" Lode claim; thence along the southeasterly side line of said claim S. 54 deg. 30′ W. 317 feet to point of intersection with the westerly end line of the Uhlig No. 2 Lode claim; thence along this end line N. 20 deg. 12′ W. 217 6/10 feet to corner No. 4 of last said claim; thence along its northerly side line N. 50 deg. 38′ E. 260 2/10 feet to point of intersection with the northeasterly end line of the "Yes You Do" Lode claim; thence S. 35 deg. 30′ E. 227 4/10 feet to corner No. 4 of this claim, the place of beginning of surface bounds. Containing 1.441 acres.

3 That on or about the 24th day of August 1898, the defendants filed the field notes and diagram of said survey of the alleged Uhlig No. 1, and Uhlig No. 2 mining claims, and also an application for a United States patent for said mining claims, in the United States land office, at Salt Lake City, State of Utah, and caused the register of said land office to give notice of said application for a patent, by publication, as required by law. That in and by said application for patent the defendants wrongfully set up and alleged that Edmund H. Uhlig and Alex McKernan were the owners and in the possession of the whole of the alleged Uhlig No. 1 and Uhlig No. 2 mining claims, inclusive of the premises last above described and the lode therein, part of the "Yes You Do" mining claims and lode, and the property, and in possession of the plaintiff.

That the plaintiff during the sixty days period of publication of the notice of application for patent for said alleged Uhlig No. 1 and Uhlig No. 2 mining claims, filed in said land office, under oath, a protest and adverse claim to said application, and for said last described premises and the lode therein, in due form and showing the

nature, extent and boundaries of the adverse claim of the plaintiff, and thereupon proceedings on said application, in said land office were and are stayed to await the determination, by a court of competent jurisdiction, of the right of possession to said last described premises, and the rights of the respective parties therein and thereto, and to that end the plaintiff brings this suit, the period of thirty days not having elapsed since the filing of said protest and adverse claim.

That the defendants maintain and prosecute said application for patent for the alleged Uhlig No. 1 and Uhlig No. 2 mining claims, and thereby the title and possession of plaintiff in and to the
4 last above described premises, being the area thus brought in conflict between the "Yes You Do" mining claim and the alleged Uhlig No. 1 and Uhlig No. 2 mining claims, are wrongfully impeached, clouded and encumbered, and the value of plaintiff's estate and property therein greatly depreciated to his great damage.

The plaintiff therefore prays judgment and relief against the defendants Edmund H. Uhlig and Alex McKernan.

That the plaintiff is the owner and lawfully in, and entitled to the possession of the last above described premises, the area in conflict between the "Yes You Do" mining claim, and the alleged Uhlig No. 1 and Uhlig No. 2 mining claim, and the lode therein, and quieting and confirming plaintiff's title thereto and possession thereof.

That the defendants have no title to or right of possession of said conflict area or the lode therein, or any part thereof.

That the defendant- be restrained, pending the action, and upon trial perpetually, from entering in or on said conflict area or the lode therein, or any part thereof, or mining in or extracting any ores or minerals therefrom, and from in any — interfering with the possession thereof; also that the plaintiff have all other and further relief proper, with costs of suit.

N. W. SONNEDECKER,
Attorney for Plaintiff.

5 STATE OF UTAH, }
County of Salt Lake, } *ss:*

G. Lavignino being duly sworn says he is the plaintiff in this action, and knows the contents of the foregoing complaint; that said complaint is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it true.

G. LAVAGNINO.

Subscribed and sworn to before me this 14th day of November, 1898.

[SEAL.] WILLIAM J. BARRETTE,
Notary Public.

My commission expires November 16th, 1900.

6 In the District Court of the Third Judicial District, State of Utah, County of Salt Lake.

G. LAVIGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN, Defendants. } Demurrer.

Now comes the defendant Edmund H. Uhlig, and demurs to the complaint of the plaintiff herein upon the following grounds:

1st. That the said complaint does not state facts sufficient to constitute a cause of action.

2nd. That the said complaint is ambiguous, undertain and unintelligible in this: That no definite or sufficient description of the mining claim alleged to be owned by the plaintiff and called the "Yes You Do" mining claim is given in said complaint, and that from the description, as contained in said complaint, of the said alleged claim, it is impossible to determine where the same is located, and that the various descriptions of the property claimed to be owned by the plaintiff, and of the property claimed to be in conflict with defendants' claim are inconsistent with each other and are so confusing and uncertain that it is impossible for the defendant to intelligently answer the same.

CHARLES W. MORSE AND
ALBERT W. CASEY,
Attorneys for the Defendant Edmund H. Uhlig.

Received a copy of the above demurrer this 24th day of February, 1899.

N. W. SONNEDECKER.

7 In the District Court of the Third Judicial District, County of Salt Lake, State of Utah.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG ET AL., Defendants. } Motion.

The defendant Alex McKernan, appearing specially for the purposes of this motion only, moves the court to quash the summons heretofore served upon him in this action and to dismiss this action upon the following grounds:

1. That the summons served upon him was not in the form nor substantially in the form required by section 2939 of the Revised Statutes of Utah.

2. That no summons was issued within three months from the date of filing the complaint in this action in the office of the clerk of this court.

3. That no summons and proof of service thereof was filed in the office of the clerk of this court within ten days after service of the same as required by section 2946 of the Revised Statutes of Utah.

C. W. MORSE AND
ALBERT W. CASEY,
Attorneys for Defendant Alex McKernan.

We do hereby certify that we are counsel for defendant Alex McKernan in the above entitled action, and in our opinion the objections set forth in the foregoing motion are well taken.

C. W. MORSE AND
ALBERT W. CASEY,
Attorneys for Defendant Alex McKernan.

Due and personal service of the foregoing is hereby admitted this fourth day of August, 1899.

N. W. SONNEDECKER,
Attorney for Plaintiff.

8 SHERIFF'S OFFICE.

STATE OF UTAH,
County of Salt Lake, } ss:

I, John F. Howells, sheriff of Salt Lake county, State of Utah, do hereby certify that I received the within and hereto annexed summons on the 15th day of July, 1899, and that I have served said summons on Alex McKernan by delivering to and leaving with him personally a true copy of said summons on the 15th day of July, 1899, at the city and county of Salt Lake and State of Utah, and at the time of the service of said summons so served on Alex McKernan I endorsed on the copy so served the date and place of service and added my official title thereto.

JOHN F. HOWELLS,
Sheriff Salt Lake County, Utah,
By A. G. DYER, *Deputy.*

Dated July 17, 1899.

Fees	1.00
Mile	.20
	1.20

9 In the District Court of the Third Judicial District of the State of Utah, County of Salt Lake.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG ET AL., Defendants. } Summons.

The State of Utah to said defendant-:

You are hereby summoned to appear within twenty days after the service of this summons upon you, if served within the county in which this action is brought, otherwise, within thirty days after service, and defend the above entitled action; and in case of your failure to do so, judgment will be rendered against you according to the demand of the complaint which within ten days after service of this summons upon you will be filed with the clerk of said court.

N. W. SONNEDECKER,
Plaintiff's Attorney.

P. O. address 614 & 615 Progress block, Main street, Salt Lake City, Utah.

Marked: Filed Aug. 9, 1899. David C. Dunbar, clerk, dist. court of Salt Lake county, by F. J. Rawlings deputy. Received at sheriff's office July 7, 1899, John F. Howells sheriff, Salt Lake county, Utah.

10 In the District Court for the Third Judicial District, County of Salt Lake, State of Utah.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG ET AL., Defendants.

To the plaintiff and N. W. Sonnedecker, his attorney:

Please take notice that on Saturday the seventh day of October A. D. 1899, at 9:30 o'clock a. m., at the court room of said court, before the Honorable Ogden Hiles, judge, at the city and county building, Salt Lake City in said county, the defendant Alex McKernan will call up the motion of said defendant to quash the summons served upon him in this action and to dismiss the action, and ask to have said motion granted. Said motion will be made on the records and files in said action.

ALBERT W. CASEY AND
MOORE & WHITTEMORE,
Attorneys for Defendant Alex McKernan.

Due and personal service of the foregoing is hereby admitted this 28th day of September, A. D. 1899.

N. W. SONNEDECKER,
Attorney for Plaintiff.

11 In the Third District Court of Utah, Salt Lake County.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN, Defendants. } Affidavit.

STATE OF UTAH,
County of Salt Lake, } ss:

N. W. Sonnedecker, being first duly sworn deposes and says that he is attorney for plaintiff herein, that he filed the complaint herein on the 16th day of November, 1898, describing the "Yes You Do" Lode mining claim in West Mountain mining district, Salt Lake county, Utah, as an adverse of the Uhlig No. 1 and Uhlig No. 2 Lode mining claims claimed by defendants herein; that this affiant made repeated efforts to reach the defendants and was informed and believes that they were at work in the mines in the mountains inaccessible on account of deep snow; that on the 4th day of February 1899, within three months after the filing of the complaint a summons was issued as shown by the records of the sheriff's office of Salt Lake county to these defendants and that a copy of said summons with a copy of the complaint herein was served on the defendant Edmund H. Uhlig, February 7, 1899, and being unable to find the defendant Alex McKernan, said summons was returned
12 March 29, 1899; that an alias was issued as shown by the files herein and served on the defendant Alex McKernan July 15, 1899.

N. W. SONNEDECKER.

Subscribed and sworn to before me this 16th day of October, 1899.

ALVIN V. TAYLOR,
[SEAL.] *Notary Public.*

13 In the District Court of the Third Judicial District in and for the County of Salt Lake, Utah.

G. LAVAGNINO
vs.
EDMUND H. UHLIG ET AL. } No. 2285.

The motion to quash the summons heretofore issued and to dismiss the plaintiff's complaint herein, having been heretofore fully argued and submitted, and the court having duly considered the

same, and being fully advised in the premises, it is now ordered that said summons heretofore issued, in so far as it may respect the defendant Alexander McKernan, be, and the same is hereby quashed.

And it is further — that the plaintiff's complaint, in so far as it may respect the defendant Alexander McKernan, be, and the same is hereby dismissed.

And it is further ordered that the demurrer to the plaintiff's complaint in so far as it may relate to the defendant Uhlig be, and the same is hereby overruled.

Dated November 22nd, 1899.

14 In the District Court of the Third Judicial District in and for the County of Salt Lake, Utah.

G. LAVAGNINO
v.
EDMUND H. UHLIG ET AL. } No. 2285.

G. LAVAGNINO
v.
JAMES M. GAREY ET AL. } No. 2451.

Upon motion of Mr. Albert W. Casey, attorney for the defendants in each of the within causes, and good cause being shown, it is ordered that the order heretofore made in each of the within causes on November 22, 1899, overruling the demurrers herein be, and the same is hereby set aside and held for naught in so far as it may relate to the ruling upon the said demurrers and to them only.

Dated November 25, 1899.

15 In the Third District Court of Utah in and for Salt Lake County.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN, Defendants. } Amended Complaint.

The plaintiff above named confessing the demurrer of the defendants heretofore filed herein, files this his amended complaint.

Plaintiff alleges:

I.

That on the 23rd day of August, 1880 he declared his intention to become a citizen of the United States in the fourth district court of Colorado sitting at Leadville, Lake county of said State.

II.

That on or about the 1st day of January, 1898, the plaintiff's grantor was and ever since, until about the 1st day of November, 1898, has been and the plaintiff ever since has been and now is the owner in the possession and entitled to the possession (subject to the paramount title of the United States) of that certain lode mining claim containing a lode of rock in place bearing silver and other precious metals situated in West Mountain mining district, Salt Lake county, Utah, called the "Yes You Do," and plaintiff alleges that he and his grantor have during all of said time complied with the requirements of the laws, rules and regulations of the United States, the State of Utah and the West Mountain mining district to entitle him to said lode claim.

16 The description of said claim is as follows: Beginning at corner post No. 1 of said claim running thence north 60 deg. 11 min. east 1034.3 feet to corner No. 2; thence north 39 deg. 3 min. east 384.8 feet to corner No. 3; thence south 35 deg. 30 min. east 600 feet to corner No. 4; thence south 54 deg. 30 min. west 1400 feet to corner No. 5; thence north 35 deg. 30 min. west 600 feet to corner No. 1 the place of beginning. The presumed course of the lode of said claim from the discovery point thereof bears north 36 deg. 69 min. east 356.1 feet to the northerly end line and south 60 deg. 16 min. west 1065.8 feet to the southerly end line.

III.

That the defendants claiming to be the owners of alleged adjacent mining claims called the Uhlig No. 1 and Uhlig No. 2 Lode mining claims, on or about the first day of July, A. D. 1898, wrongfully caused said alleged Uhlig No. 1 and Uhlig No. 2 mining claims to be so surveyed as to cross upon and overlap the "Yes You Do" Lode mining claim, and include portions thereof as follows: The conflict area with the said Uhlig No. 2 Lode mining claim is described as follows: Beginning at a point on the northerly side line of said Uhlig No. 2 Lode mining claim 1177.6 feet distant from corner No. 1 of said claim south 50 deg. 38 min. west from said corner No. 1 running thence south 35 deg. 30 min. east 227.4 feet; thence south 54 deg. 30 min. west 317 feet; thence north 20 deg. 12 min. west 217.6 feet to corner No. 4 of said Uhlig No. 2; thence north 50 deg. 38 min. east 260.2 feet to the place of beginning. An area of 1.441 acres.

The conflict in area with the said Uhlig No. 1 Lode mining claim is described as follows: Beginning at a point on the westerly end line of the Uhlig No. 2 Lode claim 217.6 feet from corner No. 4 of said Uhlig 2, running thence south 54 deg. 30 min. west 1083 feet; thence north 35 deg. 30 min. west 376.1 feet, thence north 20 deg. 12 min. west 54.3 feet; thence south 72 deg. 46 min. east 1145.3 feet,

thence south 20 deg. 12 min. east 72.1 feet to the place of beginning. An area of 6.374 acres.

17 The northwest corner of section 32 tp. 3 south range 2 west bears north 69 deg. 59 min. east 8823.9 feet distant from corner No. 1 of said Uhlig No. 2 mining claim.

That in or about the 24th day of August, 1898, the defendants filed the field notes and a diagram of said surveys of the alleged Uhlig No. 1 and Uhlig No. 2 mining claims, and also made an application for a United States patent for said mining claims, in the United States land office, at Salt Lake City, State of Utah, and caused the register of said land office to give notice of said application for a patent, by publication, as required by law. That in and by said application for patent the defendants wrongfully set up and alleged that Edmund H. Uhlig and Alex McKernan were the owners and in the possession of the whole of the alleged Uhlig No. 1 and Uhlig No. 2 mining claims, inclusive of the premises last above described and the lode therein, part of the "Yes You Do" mining claim and lode, and the property, and in possession of the plaintiff.

That the plaintiff during the sixty days' period of the publication of the notice of application for patent for said Uhlig No. 1 and Uhlig No. 2 mining claims, filed in the said land office, under oath, a protest and adverse claim to said application, and for said last described premises and the lode therein, in due form and showing the nature, extent and boundaries of the adverse claim of the plaintiff, and thereupon proceedings on said application, in said land office were and are stayed to await the determination by a court of competent jurisdiction, of the right of possession to said last described premises, and the rights of the respective parties therein and thereto, and to that end the plaintiff brings this suit, the period of thirty days not having elapsed since the filing of said protest and adverse claim.

18 That the defendants maintain and prosecute said application for patent for the alleged Uhlig No. 1 and Uhlig No. 2 mining claims, and thereby the title and possession of plaintiff in and to the last above described premises, being the area thus brought in conflict between the "Yes You Do" mining claim and the alleged Uhlig No. 1 and the Uhlig No. 2 mining claims are wrongfully impeached, clouded and encumbered, and the value of the plaintiff's estate and property therein greatly depreciated, to his great damage.

The plaintiff therefore prays judgment and relief against the defendants Edmund H. Uhlig and Alex McKernan.

That the plaintiff is the owner and lawfully in and entitled to the possession of the last above described premises, the area in conflict between the "Yes You Do" mining claim and the alleged Uhlig No. 1 and Uhlig No. 2 mining claims, and the lode therein; and quieting and confirming plaintiff's title thereto and possession thereof.

That the defendants have no title to or right of possession of said conflict area or the lode therein, or any part thereof.

That the defendants be restrained, pending the action, and upon trial perpetually, from entering in or on said conflict area or the lode therein, or any part thereof, or mining in or extracting any ores or minerals therefrom, and from in any way interfering with the possession thereof. Also that the plaintiff have all other further proper relief, with costs of suit.

N. W. SONNEDECKER,
Attorney for Plaintiff.

19 STATE OF UTAH, } ss:
County of Salt Lake, }

G. Lavagnino being duly sworn says he is the plaintiff in this action and knows the contents of the foregoing complaint; that said complaint is true of his own knowledge; except as to those matters therein stated on information and belief and as to those matters he believes it to be true.

G. LAVAGNINO.

Subscribed and sworn to before me this 15th day of January, 1900.

[SEAL.] THOS. C. ARMSTRONG,
Notary Public.

My commission expires April 15, 1901.

20 In the District Court of the Third Judicial District, County of Salt Lake, State of Utah.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG ET AL., Defendants. } Demurrer to Amended Complaint.

Comes now the defendant Edmund H. Uhlig and demurs to the amended complaint of the plaintiff herein upon the following grounds:

1. That said amended complaint does not state facts sufficient to constitute a cause of action.

2. That the said amended complaint is ambiguous, uncertain and unintelligible in this: That no definite or sufficient description of the mining claim alleged to be owned by plaintiff and called the "Yes You Do" mining claim is given in said amended complaint, and that from the description of said alleged claim as contained in said amended complaint, it is impossible to determine where the same is located, and that the various descriptions of the property claimed to be owned by the plaintiff, and of the property claimed to be in conflict with the defendant's claim are inconsistent with

each other and are so confusing and uncertain that it is impossible for the defendant to intelligently answer the same.

Dated January 22, 1900.

C. W. MORSE AND
ALBERT W. CASEY,
Attorneys for the Defendant Edmund H. Uhlig.

Due and personal service of the above demurrer, together with receipt of a copy of the same is hereby admitted this twenty-fourth day of January A. D. 1900.

N. W. SONNEDECKER,
Attorney for Plaintiff.

21 In the District Court of the Third Judicial District in and for the County of Salt Lake, Utah.

G. LAVAGNINO
v.
EDMUND H. UHLIG ET AL. } No. 2285.

Comes now the plaintiff herein by his attorney N. W. Sonnedecker, and confesses the demurrer heretofore filed by the defendants to the plaintiff's complaint, and is by the court granted fifteen days' time in which to amend his complaint or to file an amended complaint herein.

Dated July 7, 1900.

22 In the Third Judicial District Court in and for the County of Salt Lake, State of Utah.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN, Defendants. } No. 2285. Complaint.

Now comes the plaintiff, leave of court having been had, and files this, his second amended complaint, alleging:

1. That on the 23rd day of August, 1880, he declared his intention of becoming a citizen of the United States, in the fourth district court of Colorado, sitting at Leadville, Lake county, in said State, and that J. Fewson Smith, Jr., is a natural born citizen of the United States.

2. That on or about the 1st day of January, 1898, the above named J. Fewson Smith, Jr., entered upon the unoccupied and unclaimed mineral lands of the United States, situated in the West Mountain mining district, Salt Lake county, Utah, and discovered a lode of rock in place, containing gold and silver and other pre-

cious metals, and there and then erected a monument, and posted a notice thereon, naming the said lode the "Yes You Do" Lode mining claim, giving the data of the location and the length of the lode or vein, adding his name thereto as locator, describing the location of the said discovery by reference to natural objects and permanent monuments sufficient to identify the said claim, and then and there, on said day, distinctly marked the boundaries of said claim on the ground so that they could be readily traced, and thereafter a copy of said notice was recorded in Book "E," on page 145, of the said
23 records of Salt Lake county, Utah, and thereafter, to-wit, on the 5th day of September, 1898, by quit claim deed, regularly executed and delivered, conveyed to the plaintiff herein, G. Lavagnino, the above described property of the "Yes You Do" Lode mining claim. That this plaintiff and his grantor have, during all the times herein mentioned, complied with all the laws, rules and regulations of the United States, of the State of Utah and of the West Mountain mining district, to entitle them to the possession of the said lode mining claim.

A description of the "Yes You Do" mining claim is as follows, to-wit:

Commencing at corner No. 1 of said "Yes You Do" Lode mining claim, from which the northwest corner of section 32, township 3, S. R. 2 W., S. L. B. M., bears north 62 degrees 31 minutes, east, 11411.6 feet distant; running thence north 60 degrees 11 minutes, east 1034.3 feet to corner No. 2; thence north 39 degrees 3 minutes, east 384.8 feet to corner No. 3; thence south 35 degrees 30 minutes, east 600 feet to corner No. 4; thence south 54 degrees 30 minutes, west 1,400 feet to corner No. 5; thence north 35 degrees 30 minutes, west 600 feet to corner No. 1, the place of beginning.

3. That the defendants, claiming to be the owners of alleged adjacent mining claims, called the "Uhlig No. 1" and "Uhlig No. 2" Lode mining claims, on or about the 1st day of July, 1898, wrongfully caused said "Uhlig No. 1" and "Uhlig No. 2" Lode mining claims to be so surveyed as to cross upon and overlap the "Yes You Do" Lode mining claim and include portions thereof, as follows: Conflict area with "Uhlig No. 2" lode:

Beginning at a point on the northerly side line of the said "Uhlig No. 2" Lode mining claim 1177.6 feet distant from corner No. 1 of said claim, south 50 degrees 38 minutes west from said corner No. 1, running thence south 35 degrees 30 minutes, east 227.4 feet; thence south 54 degrees 30 minutes, west 317 feet; thence north 20 degrees 12 minutes, west 217.6 feet, to corner No. 4 of said "Uhlig No. 2;" thence north 50 degrees 38 minutes, east 260.2 feet to the place of beginning, an area of 1.441 acres.

The conflict area with the said "Uhlig No. 1" Lode mining claim is described as follows:

Beginning at a point on the westerly end line of the "Uhlig No. 2" Lode claim, 217.6 feet from corner No. 4 of said "Uhlig No. 2," running thence south 54 degrees 30 minutes, west 1083 feet; thence

north 35 degrees 30 minutes, west 376.1 feet; thence north 20 degrees 12 minutes, west 54.3 feet; thence south 72 degrees 46 minutes, east 1145.3 feet; thence south 20 degrees 12 minutes, east 72.1 feet to the place of beginning.

24 & 25 The northwest corner of section 32, township 3 south, range 2 west, bears north 69 degrees 59 minutes, east 8823.9 feet distant from corner No. 1 of said "Uhlig No. 2" Lode mining claim.

That on or about the 24th day of August, 1898, the defendants filed the field notes and a diagram of said surveys of the alleged "Uhlig No. 1" and "Uhlig No. 2" mining claims; and also an application for a United States patent for said mining claims, in the United States land office at Salt Lake City, State of Utah, and caused the register of said land office to give notice of said application for patent by publication, as required by law. That in and by said application for patent the defendants wrongfully set up and alleged that Edmund H. Uhlig and Alex McKernan were the owners and in the possession of the whole of the said "Uhlig No. 1" and "Uhlig No. 2" mining claims, inclusive of the premises last above described, and the lode therein, part of the "Yes You Do" mining claim and lode, and the property and in possession of the plaintiff.

That the plaintiff, during the sixty days' period of the publication of the notice of application for patent for said "Uhlig No. 1" and "Uhlig No. 2" mining claims, filed in the said land office, under oath, a protest and adverse claim to said application, and for said last described premises and the lode therein, in due form, and showing the nature, extent and boundaries of the adverse claim of the plaintiff, and thereupon proceedings on said application in said land office were and are stayed to await the determination, by a court of competent jurisdiction, of the right of possession to the said last described premises, and the rights of the respective parties therein and thereto, and to that end the plaintiff brings this suit, the period of thirty days not having elapsed since the filing of said protest and adverse claim.

That the defendants maintain and prosecute said applications for patent for the alleged "Uhlig No. 1" and "Uhlig No. 2" mining claims, and thereby the title and possession of the plaintiff in and to the last described premises, being the area thus brought into conflict between the "Yes You Do" mining claim and the alleged "Uhlig No. 1" and "Uhlig No. 2" mining claims are wrongfully impeached, clouded, encumbered and the value of the plaintiff's estate and property therein greatly depreciated, to his great damage.

26 The plaintiff therefore prays judgment and relief against the defendants Edmund H. Uhlig and Alex McKernan.

That the plaintiff is the owner and lawfully in, and entitled to the possession of the last above described premises, the area in conflict between the "Yes You Do" mining claim and the "Uhlig No. 1" and "Uhlig No. 2" mining claims, and the lode therein; and quiet-

ing and confirming the plaintiff's title thereto and possession thereof.

That the defendants have no title to or right to possession of said conflict area or the lode therein, or any part thereof.

That the defendants be restrained, pending the action, and upon trial perpetually from entering in or on said conflict area or the lode therein, or any part thereof, or mining in or extracting any ores or minerals therefrom, and from in any way interfering with the possession thereof. Also that the plaintiff have all further and proper relief, with costs of suit.

N. W. SONNEDECKER,
Attorney for Plaintiffs.

STATE OF UTAH, } ss:
County of Salt Lake, }

N. W. Sonnedecker, being first duly sworn, says that he is attorney for the plaintiff herein; that he makes this affidavit because the plaintiff is absent from Salt Lake county, State of Utah, wherein this affiant resides; that he knows the contents of the foregoing complaint, and that said complaint is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

N. W. SONNEDECKER.

Subscribed and sworn to before me this 21st day of July A. D. 1900.

[SEAL.]

H. G. TWOMEY,
Notary Public, Salt Lake County, Utah.

27 In the District Court of the Third Judicial District in and for the County of Salt Lake and State of Utah.

G. LAVIGNINO
v.
EDMUND H. UHLIG ET AL. } No. 2285.

G. LAVAGNINO
v.
JAMES M. GAREY ET AL. } No. 2451.

Upon motion of Mr. A. W. Casey, attorney for the defendants herein, in each of the within causes, and good cause being shown, it is now here ordered that said defendants herein, and each of them, have, and they are hereby granted to and including September 1st, 1900, in which to plead to the plaintiff's amended complaint heretofore filed herein.

Dated July 25th, A. D. 1900.

28 In the District Court for the Third Judicial District, Salt Lake County, State of Utah.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN, Defendants.
} Affidavit of Service by Attorney.

STATE OF UTAH,
County of Salt Lake, } ss:

Albert W. Casey being first duly sworn on his oath says that he is one of the attorneys for the defendant Edmund H. Uhlig, in the above entitled action; that he served upon the plaintiff above named the within and attached answer to plaintiff's second amended complaint in said action, by leaving a copy of the same in a conspicuous place in the office of N. W. Sonnedecker, one of the attorneys for the plaintiff herein, on the first day of September 1900 at thirty minutes past two o'clock in the afternoon of said day, there being no person in his office at that said time, and further affiant sayeth not.

ALBERT W. CASEY.

Dated September 1, 1900.

Subscribed and sworn to before me this 1st day of September 1900.

[SEAL.] H. G. TWOOMEY,
Notary Public in and for Salt Lake County, Utah.

29 In the District Court for the Third Judicial District, Salt Lake County, State of Utah.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX. MCKERNAN, Defendants.
} Answer to 2nd Amended Complaint.

Comes now the defendant Edmund H. Uhlig, and for answer to plaintiff's second amended complaint, in the above entitled action, alleges:

1. Defendant denies each and every allegation in plaintiff's said complaint contained, not herein qualified or admitted.

2. Defendant denies that on the 1st day of January, 1898, or at any time prior or subsequent thereto, the plaintiff or his grantor was the owner or owners or entitled to the possession or in the possession of the alleged mining claim described in plaintiff's said complaint at the "Yes You Do" mining claim.

3. Defendant alleges that on or about the 1st day of January, 1889, this defendant, said Edmund H. Uhlig, entered upon then unclaimed and unoccupied mineral land of the United States in the West Mountain mining district in Salt Lake county, State of Utah, and then and there duly located two certain lode mining claims named and known as the "Uhlig No. 1" and the "Uhlig No. 2," which said last two mining claims are described, with magnetic variation at 16 degrees 28 minutes east, as follows:

Commencing at corner No. 1 of said "Uhlig No. 1" claim, and running north 20 degrees 12 minutes, west 145.5 feet to corner No. 4 of said "Uhlig No. 2" claim; thence north 50 degrees 38 minutes, east 1437.8 feet to corner No. 1 of said "Uhlig No. 2" claim; thence south 20 degrees 12 minutes, east 600 feet to corner No. 2 of said "Uhlig No. 2" claim; thence south 50 degrees 38 minutes, west 1437.8 feet to corner No. 3 of said "Uhlig No. 2" claim; thence south 20 degrees 12 minutes, east 145.5 feet to corner No. 2 of said "Uhlig" No. 1 claim; thence south 76 degrees 36 minutes, west 1151.9 feet to corner No. 3 of said "Uhlig No. 1" claim; thence north 20 degrees 12 minutes, west 522.9 feet to corner No. 4 of said "Uhlig No. 1" claim; thence north 72 degrees 46 minutes, east 1145.3 feet to corner No. 1 of said "Uhlig No. 1" claim, the place of beginning.

The northwest corner of section 32, township 3 south, range 2 west, bears as follows from corners No. 1 of said claims respectively: From No. 1 of said "Uhlig No. 1" claim north 60 degrees 28 minutes, east 10,255.6 feet; and from corner No. 1 of "Uhlig No. 2" claim, north 62 degrees 59 minutes, east 8823.9 feet.

That thereafter defendant Edmund H. Uhlig conveyed to Alex McKernan an undivided one-third interest in said two last named claims by deed dated October 19, 1896, and recorded in the office of the recorder of Salt Lake county, July 20th, 1897, in Book "O," on page 430. And this defendant denies that on or about the 1st day of July, A. D. 1898, or at any other time, either he or said Alex McKernan wrongfully or in any way caused a survey of the two last named claims to be made so as to cross upon or to overlap or in any manner to conflict with the plaintiff's alleged "Yes You Do" claim, or any other claim or property of plaintiff or his grantors; and this defendant alleges that ever since the location of the said two last named claims, he and Alex McKernan, subject only to the paramount title of the United States, during all the times of their respective record titles, have been the owners in the possession and entitled to the possession of the said "Uhlig No. 1" and the "Uhlig No. 2" Lode claims.

4. This defendant alleges that during all the time herein mentioned he was and now is a naturalized citizen of the United States; and said Alex McKernan, during his lifetime, was a native-born citizen of the United States.

5. This defendant alleges that the area in conflict as set forth in the plaintiff's said complaint is part of said two last named claims,

and plaintiff has no right, title, or interest in any manner to any part thereof.

6. This defendant alleges that on or about the 24th day of August, 1898, the field notes and diagram of survey for said "Uhlig No. 1" and "Uhlig No. 2" claims, and also an application for United States patent to the same were filed with the United States land office in Salt Lake City, Utah, and that due notice of said application was given as required by law; and this defendant alleges that he and his said co-owner have complied with the requirements of the laws of the United States and of the State of Utah, to entitle them to a patent to all of said "Uhlig No. 1" and "Uhlig No. 2" Lode mining claims (excepting only such fractions of conflicting claims as may be excluded in said application for patent), and that plaintiff has no right, title or interest in any manner in or to any part of said "Uhlig No. 1" and "Uhlig No. 2" claims.

31–33 7. This defendant further alleges that on the 22nd day of November, A. D. 1899, by an order of this court, duly made and entered, this action was dismissed as to the defendant Alex McKernan, and defendant further alleges that such dismissal operated as complete discontinuance of this action, and this defendant pleads such dismissal in bar of the further prosecution of the same.

Wherefore, this defendant demands judgment:

1. That plaintiff be decreed to have no right, title or interest in or to any part of the said "Uhlig No. 1" and "Uhlig No. 2" Lode mining claims.

2. That defendant and his said co-owner, or his legal representatives, be decreed to be the sole owners and solely entitled to the possession of all of the said "Uhlig No. 1" and "Uhlig No. 2" Lode mining claims, and entitled to a United States patent therefor.

3. For costs and disbursements of this action.

C. W. MORSE AND
ALBERT W. CASEY,
Attorneys for Defendant E. H. Uhlig.

STATE OF UTAH, }
County of Salt Lake, } ss:

Edmund H. Uhlig, being first duly sworn, on his oath says that he is one of the defendants named in the above entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to those matters stated therein upon information and belief, and as to those matters he believes them to be true.

EDMUND H. UHLIG.

Subscribed and sworn to before me this 1st day of September, A. D. 1900.

[SEAL.]

H. G. TWOMEY,
Notary Public in and for Salt Lake County, Utah.

Filed Sept. 1, 1900.

34 In the District Court of the State of Utah, Third Judicial District, Salt Lake County.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN, Defendants.
} Notice of Motion for Continuance.

To G. Lavagnino, the plaintiff above named, and to N. W. Sonnedecker, his attorney:

Please take notice that on Saturday the twenty-sixth day of January, A. D. 1901, at the court room for the chancery division of said court in Salt Lake City, Utah, before the Hon. William C. Hall, judge of said court, at ten o'clock in the forenoon of said day, or as soon thereafter as counsel may be heard, the grantees of the defendant Edmund H. Uhlig above named will move for a continuance and postponement of the trial of said cause.

Said motion will be made on affidavits showing the materiality of evidence expected to be obtained, and that due diligence has been used to obtain it; showing the illness and consequent inability to attend of a material witness and officer of said defendant's grantee; showing the necessity of his attendance at the trial and the impossibility of such attendance at the time said trial is now set, and upon the records and files in the case.

ALBERT W. CASEY,
Attorney for the Grantees of Defendant Edmund H. Uhlig.

Received copy of the foregoing notice this 21st day of January A. D. 1901.

N. W. SONNEDECKER,
Attorney for Plaintiff.

35 In the District Court of the Third Judicial District in and for the County of Salt Lake.

G. LAVAGNINO
v.
EDMUND H. UHLIG ET AL.
} No. 2285.

Upon motion of Mr. Albert W. Casey, attorney for the defendant herein, and good cause being shown, it is after due consideration, ordered that the Saint Joe Mining Company, a corporation, be, and it is hereby substituted for the defendant Edmund H. Uhlig herein.

Dated January 25th, 1901.

36 In the District Court of the Third Judicial District, Salt Lake County, Utah, State of Utah.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG, ALEX MCKERNAN, and The Saint Joe Mining Company, a Corporation, Defendants.

No. 2285. Notice of Motion to Take Testimony and for Continuance.

To the plaintiff, G. Lavagnino, and to N. W. Sonnedecker, Esq., his attorney:

Please take notice that on Wednesday the thirteenth day of March at ten o'clock in the forenoon, or as soon thereafter as counsel may be heard, at the court room of said court, at Salt Lake City, in said county, before the Hon. W. C. Hall, The Saint Joe Mining Company, one of said defendants will move the court that a commission issue out of and under the seal of the court to take the testimony of Daniel Harrington, a witness residing out of the State, directed to some proper person residing in the county of Silver Bow and State of Montana, then and there to be selected and appointed by the judge of this court.

At the said time and place the said defendant will move the said court for a continuance of the trial of said cause on the ground of the absence of evidence.

Said motions will be made on the files and records in the case and upon the affidavit hereto attached.

Dated March 11, 1901.

ALBERT W. CASEY,
Attorney for said Defendant, Saint Joe Mining Company.

Good cause being shown therefor, it is ordered that the time of giving the foregoing notice is hereby shortened to two days.

Dated March 11, 1901.

WM. C. HALL, *Judge.*

37 In the District Court for the Third Judicial District, County of Salt Lake, State of Utah.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN and The St. Joe Min. Co., a Corporation, Defendants.

Affidavit on Motion to Take Testimony.

STATE OF UTAH,
County of Salt Lake, } ss:

R. A. Hasbrouck being first duly sworn on his oath says that he is the president of The Saint Joe Mining Company, one of the parties

defendant in the above entitled action; that the time for the trial of the same is set for the present term of this court in the chancery division thereof; that Daniel Harrinington is a material and necessary witness for said defendant on the trial of said action, without the benefit of whose testimony the said defendant cannot safely proceed to trial; that said witness resides in Silver Bow county, in or near the city of Butte, in the State of Montana, and is out of this State and will continue absent during the present term of this court.

That the reason that this application has not been made before is that the whereabouts and residence of said witness was not known to this affiant until the fourth day of the present month, when affiant was informed that the said witness resided about eight miles from a post office known as South Butte in the State of Montana, whereupon affiant immediately wrote a letter to said witness, enclosed the same in an envelope with the required postage
38 stamp thereon and mailed the same duly addressed to this witness, by depositing it in a United States letter box, to ascertain and confirm the truth of said information as to said witness' said residence; that no reply was received therefrom until the eighth day of March, 1901, and that affiant immediately, to-wit: on the ninth day of March, 1901, informed counsel for said company.

Affiant further says that he has read the statement of the evidence expected to be obtained from said Daniel Harrington as shown in the affidavit of Albert W. Casey hereto attached, and the same is substantially identical with the statements heretofore made to affiant by said witness.

Dated March 11, 1901.

R. A. HASBROUCK.

Subscribed and sworn to before me this 11th day of March, 1901.

CHAS. D. SAVERY,

[SEAL.] *Notary Public in and for said Salt Lake County.*

My commission expires Dec. 9, 1904.

39 In the District Court for the Third Judicial District, Salt Lake County, State of Utah.

G. LAVAGNINO, Plaintiff, v. EDMUND H. UHLIG, ALEX MCKERNAN, and The St. Joe Min. Co., a Corporation, Defendants.	Affidavit on Motion for Continuance.

STATE OF UTAH, *County of Salt Lake,* } ss:

Albert W. Casey being first duly sworn on his oath says that he is one of the attorneys for The Saint Joe Mining Company, one of the

defendants in the above entitled action; that one of the witnesses for the said defendant is one Daniel Harrington, by occupation a miner and formerly and since the commencement of this action a resident of said Salt Lake county; that affiant has made due inquiry and is informed and believes that said witness is now absent from said county and said State, and has been since the present term of this court; that said defendant The Saint Joe Mining Company, by its president, R. A. Hasbrouck, has informed affiant that said company has used due diligence since the setting of this action for trial to learn the present post office address and whereabouts of said witness and this affiant has also similarly inquired but have this far been unable to learn the whereabouts or abode of said witness or his postoffice address except as stated in the affidavit of said R. A. Hasbrouck hereto attached; and affiant is informed and has reason to believe that at or before the beginning of the next term of this court the testimony of said witness by deposition can be duly taken or his personal attendance as a witness in said cause be procured in behalf of said defendants.

Affiant further says that the said Daniel Harrington is an important and material witness for the defendants in said cause and his testimony is necessary and material to the defense represented by affiant and without said testimony the said defendants cannot safely proceed with the trial of said action, and if the personal attendance of said witness cannot be obtained, it is the purpose of this affiant in behalf of said defendants to proceed in due form and with due diligence to procure his deposition.

Affiant further states that the evidence expected to be obtained from said Daniel Harrington as such witness is in substance, as follows:

That he, said witness, knew and was well acquainted with Edmund H. Uhlig, the person who located in his own name or in behalf of the locator of record, the lode mining claim known as Uhlig No. 1, Uhlig No. 2 and Mute No. 1 claims in West Mountain mining district in said county, a part of which said claims are included in the controversy in this action; that said Uhlig personally, as well as in connection with his co-owners, was living upon the ground and working upon said three claims prior to and from time to time and up to the time of their location as now appears of record, and that he worked upon and improved the said ground as an owner and having a right, title and interest in the same continuously prior to, at and subsequent to the time of their location down to the time of the acquirement by said company of and interest in and to the said claims; that the said Daniel Harrington was familiar with all of said ground and was frequently upon it and knows that the said Edmund H. Uhlig went upon the ground of the said Uhlig No. 1 and Uhlig No. 2 claims on December 31st, 1888, to relocate said claims for himself and in behalf of his co-owners and partners in interest and that said witness was on said ground soon after the 1st day of January 1889 and saw the stakes which defined the bound-

aries of said Uhlig No. 1 and Uhlig No. 2 claims and the discovery monuments and notices of location thereon; that the annual
41 assessment work on all of said three claims was kept up continuously and according to law from the time of their location down to the time of the acquiring of the interest of the said company one of the parties defendant and interested in this action, and witness knew of said assessment being done upon said claims and for their benefit and also of said assessment work for said claims being done in the Uhlig tunnel.

That said witness was employed at the time, prior and subsequent to the said location of said claims as foreman of work upon the ground distant about two thousand feet, known as the Yosemite ground and in sight of the ground in controversy in this action; that during a part of said period of said Daniel Harrington's said employment, and at the time of making said locations, the said Edmund H. Uhlig was employed by said witness at the said Yosemite ground, and the said Daniel Harrington knew of the whereabouts and actions of said Edmund H. Uhlig and of his making the said three locations; that the said Daniel Harrington is long experienced in and familiar with mining ground and with the proceeding- required by the laws of the United States and of the State of Utah and with the customs of miners in relation to properly locating lode mining claims, and knows that the said Uhlig No. 1, Uhlig No. 2 and Mute No. 1 claims were properly and duly located as aforesaid on U. S. Government land, not then claimed or occupied by any other persons and that the said three claims were duly represented down to the time of their conveyance to the said company defendant herein, according to the laws of the United States and of the State of Utah and of the regulations thereunder.

ALBERT W. CASEY.

Subscribed and sworn to before me this 11th day of March, 1901.

[SEAL.] CHAS. D. SAVERY,
Notary Public.

My commission expires Dec. 9, 1904.

42 In the District Court of the Third Judicial District, Salt Lake County, State of Utah.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG, ALEX MCKERNAN, and The Saint Joe Mining Company, a Corporation, Defendants.

Interrogatories Proposed to Daniel Harrington, a Witness on Behalf of the Defendant, The Saint Joe Mining Company.

Interrogatories Proposed on Direct Examination by Attorneys for the Defendant, The Saint Joe Mining Company.

DANIEL HARRINGTON, a witness produced on behalf of the said defendant, being first duly sworn, testified as follows:

Interrogatory I. What is your name, age and place of residence?

Interrogatory II. What is your occupation now and how long have you followed it?

Interrogatory III. Are you familiar with the prospecting, locating and developing of lode mining claims, and with the business of mining in general, and particularly with the same as carried on in West Mountain mining district in Salt Lake county, State of Utah?

Interrogatory IV. When and how long, if at any time, were you engaged in mining in said district at and near Bingham in said Salt Lake county?

Interrogatory V. Do you know Edmund H. Uhlig, and if so when and where and particularly during the years 1887 and 1888 and thereafter?

43 Interrogatory VI. Were you familiar in said years and afterwards with the ground in said district in the vicinity known as Saints Rest gulch, Revier gulch, No You Don't hill and Telegraph hill?

Interrogatory VII. State what you know of any mining operations by said Edmund H. Uhlig in said vicinity and particularly with reference to the lode locations of mining claims known as Uhlig No. 1, Uhlig No. 2 and Mute No. 1 claims?

Interrogatory VIII. State when and by whom, if within your knowledge, the locations mentioned in interrogatory VII were made?

Interrogatory IX. State whether within your knowledge the said Edmund H. Uhlig lived and worked upon the ground covered by the locations mentioned in the two last foregoing interrogatories, and if so, whether before, at the time or after the said locations were made?

Interrogatory X. State in what capacity, whether as owner, locator, lessee or otherwise, the said Edmund H. Uhlig worked upon said ground or any part of it, within your knowledge?

Interrogatory XI. State whether within your knowledge the

annual assessment work was done upon or for the benefit of any or all of said claims, and if so when and by whom?

Interrogatory XII. Describe fully all the improvements within your knowledge upon or for the benefit of said claims, what they were, when made and by whom?

44 Interrogatory XIII. If any such work was done in tunnels state where the mouth or mouths and in what directions and how far they run?

Interrogatory XIV. State whether you saw Edmund H. Uhlig on December 31st 1888, and if so where he was, what he was doing, and if he left you anywhere, state the place and in what direction he went?

Interrogatory XV. State whether you saw any stakes defining the boundaries of the claims described in interrogatory VII and if so when you saw them, and how many and what stakes they were?

Interrogatory XVI. State whether you saw the discovery points and location notices on said claims, and if so, when, upon what claims and what mining claims were referred to by such discoveries?

Interrogatory XVII. State if you know that Edmund H. Uhlig was particular in keeping the corners of claims located by him or in which he had an interest properly staked and particularly in reference to the three claims named in interrogatory VII?

Interrogatory XVIII. State whether you were familiar with the vicinity and particularly with said three claims so as to know of conflicts, if any, with said claims, or with the ground covered by them?

Interrogatory XIX. Were you upon the ground claimed by said three locations in the year 1889 and if so did you then or at any time thereafter down to the year 1898, see any discovery notices or monuments or boundary stakes of ground in conflict with said three claims, and if so what they were?

Interrogatory XX. Do you know of any work being done
45 upon or for the benefit of the three claims mentioned in interrogatory VII other than that done by Edmund H. Uhlig, or such persons as he authorized or were in company with him?

Interrogatory XXI. State whether you were employed at any time on ground known as the Yosemite ground in said district, and if so when and for how long?

Interrogatory XXII. State if you know, how the Yosemite ground is located with reference to the ground mentioned in interrogatory VII—what is the distance and whether in sight or not?

Interrogatory XXIII. Did Edmund H. Uhlig work for or with you at or near said Yosemite ground, and if so were you at that time familiar with his mining transactions. When was this?

Interrogatory XXIV. Did Edmund H. Uhlig live with or near you at any other times and if so when?

Interrogatory XXV. Did you go over the ground claims by the locations mentioned in interrogatory VII while you were in that

vicinity if at all, and if so was it sufficient to become familiar with the ground?

Interrogatory XXVI. Did you know of any other claims before 1898 than those owned in whole or in part by Edmund H. Uhlig or persons to whom he sold, on ground covered by these three locations?

Interrogatory XXVII. Do you know whether a lease was made by Edmund H. Uhlig and his co-owners of any or all of the claims named in interrogatory VII to R. E. Rex, James M. Garey, R. A. Hasbrouck or the Saint Joe Mining Company or either or all of them; if so state the fact?

46 Interrogatory XXVIII. State fully any other facts which you may know of your own knowledge on the subjects referred to in the foregoing interrogatories and explain fully such points as may not be fully and entirely answered before.

End of interrogatories on the direct examination.

47 In the District Court for the Third Judicial District, Salt Lake County, State of Utah.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN, Defendants.
} Affidavit of Attorney for Continuance.

STATE OF UTAH,
County of Salt Lake, } ss:

Albert W. Casey being first duly sworn on his oath says that he is one of the attorneys for The Saint Joe Mining Company, one of the defendants in the above entitled action; that one of the witnesses for the said defendant is one Daniel Harrington, by occupation a miner and formerly and since the commencement of this action a resident of said Salt Lake county; that affiant has made due inquiry and is informed and believes that said witness is now absent from said county and State, and has been since the present term of this court; that said defendant has stated to affiant that they have used due diligence since the setting of this action for trial to learn the present post office address and whereabouts of said witness, in this that they have inquired from time to time of persons likely to know, and this affiant has also similarly inquired but affiant has thus far been unable to learn the present whereabouts or abode of said witness or his post office address, except that he is believed to be within the State of Idaho or of Montana, and affiant is informed and has reason to believe that at or before the beginning of the next term of this court the place and abode or post office address of said witness will be known to this affiant so that said witness' testimony

by deposition can be taken or his personal attendance as a witness in said cause be procured in behalf of said defendant.

Affiant further says that the said Daniel Harrington is an important and material witness for said defendant in said cause and his testimony is necessary and material to the defense repre-
48 sented by affiant and without said testimony the said defendant cannot safely proceed to trial of said action and, if the personal attendance of said witness cannot be obtained it is the purpose of this affiant in behalf of said defendant to proceed in due form to procure his deposition when his place of abode is known.

The evidence expected to be obtained from said witness is in proof of the title continuance of occupation, possession and right of possession of defendant, its co-owners and grantors against and superior to the plaintiff and all other persons subject only to the paramount title of the United States.

Dated February 2, 1901.

ALBERT W. CASEY.

Subscribed and sworn to before me this 2nd day of February, A. D. 1901.

H. G. TWOMEY,

[SEAL.] *Notary Public in and for said Salt Lake County.*

49 In the District Court for the Third Judicial District, Salt Lake County, State of Utah.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN, Defendants.
} Affidavits on Motion for Continuance.

STATE OF UTAH, *County of Salt Lake,* } ss:

J. T. Taylor being first duly sworn on his oath says: That he is now and for more than seven years last past has been a physician and surgeon in regular and legal practice in Salt Lake City, and State of Utah; that he has personally examined in professional practice and consultation one James M. Garey who resides at number 216 West 1st South street in said Salt Lake City; that of his own knowledge said James M. Garey has been and now is confined to his bed with severe illness and much of the time in great pain and suffering and is wholly unable to attend to any business affairs whatever, and that any effort to induce said James M. Garey to do any business or to give information or testimony by deposition or otherwise would greatly menace his recovery and endanger his life; that said James M. Garey is *his* delirious in his said illness and was so on the date of this instrument, and unable to recognize

his acquaintances, and is not mentally able to perform business or work of any nature, and that from his present condition and the duration of said illness this affiant verily believes that said James M. Garey will be unable and incapable to perform any business or do any mental or physical labor for at least eight weeks from the present time although this affiant verily believes he will ultimately recover. Affiant has no interest in said cause.

J. T. TAYLOR, M. D.

Subscribed and sworn to before me this 25th day of January, A. D. 1901.

E. W. TAYLOR,
Notary Public in and for Salt Lake County.

50 In the District Court for the Third Judicial District, Salt Lake County, State of Utah.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN, Defendants.
} Affidavit of Attorney for Continuance.

STATE OF UTAH,
County of Salt Lake, } ss:

Albert W. Casey being first duly sworn on his oath says that he is one of the attorneys for The Saint Joe Mining Company, one of the defendants in the above entitled action; that one of the witnesses for the said defendant is one J. Nelson by occupation a miner and formerly and since the commencement of this action a resident of said Salt Lake county; that affiant has made due inquiry and is informed and believes that said witness is now absent from said county and State, and has been since the present term of this court; that said defendant has stated to affiant that they have used due diligence since the setting of this action for trial to learn the present post office address and whereabouts of said witness, in this that they have inquired from time to time of persons likely to know, and this affiant has also similarly inquired but affiant has thus far been unable to learn the present whereabouts or abode of said witness or his post office address, except that he is believed to be within the State of Idaho or of Montana, and affiant is informed and has reason to believe that at or before the beginning of the next term of this court the place and abode or post office address of said witness will be known to this affiant so that said witness' testimony by deposition can be taken or his personal attendance as a witness in said cause be procured in behalf of said defendant.

Affiant further says that the said J. Nelson is an important and material witness for said defendant in said cause and his testimony

is necessary and material to the defense represented by affiant
51 and without said testimony the said defendant cannot safely proceed to trial of said action and, if the personal attendance of said witness cannot be obtained it is the purpose of this affiant in behalf of said defendant to proceed in due form to procure his deposition when his place of abode is known.

The evidence expected to be obtained from said witness is in proof of the title continuance of occupation, possession and right of possession of defendant, its co-owners and grantors against and superior to the plaintiff and all other persons subject only to the paramount title of the United States.

Dated February 2, 1901.

ALBERT W. CASEY.

Subscribed and sworn to before me this 2nd day of February, A. D. 1901.

H. G. TWOMEY,

[SEAL.] *Notary Public in and for said Salt Lake County.*

52 In the District Court for the Third Judicial District, Salt Lake County, State of Utah.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN, Defendants.
} Affidavit on Motion for Continuance.

STATE OF UTAH,
County of Salt Lake, } ss:

R. A. Hasbrouck, being first duly sworn, on his oath says that he is now and for more than seven years last past has been a physician and surgeon in regular and legal practice in Salt Lake City, State of Utah; that he is now and for more than four weeks last past has been in attendance as the family physician, upon James M. Garey, who resides at No. 216 West First South street, in said Salt Lake City, and who, during said period has been and now is confined to his bed with severe illness and much of the time in great pain and suffering and wholly unable to attend to any business affairs whatever, and that any effort made to induce said James M. Garey to do any business or give information or testimony by deposition or otherwise would greatly menace his recovery and endanger his life; that said James M. Garey is continuously delirious in his said illness, and was so for more than fifteen days preceding the date of this instrument until three days last past and during said time unable to recognize his acquaintances and was not and is not mentally able to perform business or work of any nature; and that from his present

condition and the duration of his said illness this affiant verily believes that said James M. Garey will be unable and incapable to perform any business or do any mental or physical labor for at least eight weeks from the present time; that the physical and mental condition of said James M. Garey has improved within the last week and affiant believes he will eventually recover.

Affiant further says this affiant is and for more than three years last past has been the president of The Saint Joe Mining Company (a corporation) one of the defendants and party interested in this action; that during said last named period and now the said James M. Garey was and is an officer of and in the employ of said com-
53 pany and familiar with the ground and sources of titles to the same including the properties in controversy in this action; that the said James M. Garey has been familiar with and has personally performed and directed a large part of the work and business relating to said properties, including many of the acts required by law to maintain title and possession to the same and that many of the details of said matters are exclusively within the knowledge of said James M. Garey, which said details, by reason of said illness, he has been and is unable to communicate or testify to; that said James M. Garey is an important witness in the above entitled action and as one of the officers and principal employés of said company and partly interested in this cause, his presence, counsel and services are necessary and important to the trial of the same and without said James M. Garey's presence, counsel and services the defendant, said company, cannot safely or properly prepare and conduct its defense.

This affidavit is made in good faith and not merely for the purposes of delay.

R. A. HASBROUCK.

Subscribed and sworn to before me this 1st day of February, A. D. 1901.

H. G. TWOMEY,

[SEAL.] *Notary Public in and for said Salt Lake County.*

Dated February 1st, 1901.

54 In the District Court for the Third Judicial District in and for the County of Salt Lake, State of Utah.

G. LAVAGNINO
v.
G. LAVAGNINO. } Nos. 2285 and 2451.

Upon motion of Mr. A. W. Casey, attorney for the defendants in each of the within entitled causes, and Mr. N. W. Sonnedecker, attorney for the plaintiff not objecting thereto, it is ordered that said

defendants have, and they are hereby granted leave to amend their affidavits upon the motion for a continuance heretofore filed; and it is further — that said motion for a continuance be, and the same is hereby set for hearing for March 14th 1901, at the hour of ten o'clock a. m.

Dated March 13th, A. D. 1901.

55 In the District Court for the Third Judicial District, Salt Lake County, State of Utah.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG, ALEX MCKERNAN, and THE Saint Joe Mining Company (a Corporation), Defendants.

Amended Affidavit of Attorney on Motion to Take Testimony.

Albert W. Casey, being first duly sworn, for amendment by leave of court to his affidavit dated March 11, 1901, in support of motion for continuance and to take testimony, on his oath says:

That in the month of January A. D. 1901, at or about the time of the commencement of the present term of this court, affiant was informed by R. A. Hasbrouck, the president of the Saint Joe Mining Company, one of the parties defendant in this action, that one Daniel Harrington was an important and material witness for said defendant in said cause whereupon said affiant then and there enquired of said R. A. Hasbrouck as to the whereabouts of said Daniel Harrington and was informed in reply that it was not then known, but that he was believed to be absent from the State. Immediately thereafter affiant again inquired in the said month of January of said R. A. Hasbrouck and also of R. E. Rex and affiant was then informed by said R. A. Hasbrouck that said Daniel Harrington was then believed to be either in the State of Montana or in the State of Idaho, in what particular part of said State or either of them was not known to affiant's informant, and said R. E. Rex said to affiant that he could and would ascertain the particular location of said Daniel Harrington. Affiant did not know of any other sources of inquiry than the foregoing but continued to make similar inquiries from the same persons at frequent intervals down to March 9th, 1901,

56 when he was first informed of the place of abode of said Daniel Harrington. Affiant also advised the said defendant by its president that it was necessary to show diligence to learn the whereabouts of said Daniel Harington in order that his evidence might be made available on the trial of said action.

On the ninth day of March current, affiant was first informed by said R. A. Hasbrouck that the whereabouts of said witness Harrington was known, as more fully appears in the affidavit of said R. A. Hasbrouck hereto attached, which said 9th day of March was upon Saturday and affiant immediately prepared the notice and affidavits

in the present motion and duly served the same on Monday the 11th day of said month of March 1901.

The evidence expected to be obtained from said Daniel Harrington is, as follows:

That said witness was well acquainted with Edmund H. Uhlig during the year 1888, and before and subsequently down to the time of said Uhlig's death in the year 1900. That said witness was well acquainted with the mining claim in West Mountain mining district, Salt Lake county, State of Utah known as the Uhlig No. 1, Uhlig No. 2 and Mute No. 1, and knows when they were located and knows that the first two of said claims were located by said Uhlig in his own name on the first day of January 1889, and that said Mute No. 1 claim was located by said Uhlig in behalf of himself and his co-partners one J. A. Slama, but in the name of said J. A. Slama in the year 1891. That said Uhlig lived upon said ground of said three claims in a house or cabin claimed and owned by said Uhlig and said Slama and one J. B. Taylor jointly, and that said Uhlig occupied said house or cabin in the year 1887 and from time to time each year thereafter down to the year 1898 and kept tools and supplies there for mining purposes continuously during said period; that said Uhlig worked upon said ground himself and with and in behalf of his said joint owners in each of said years and in
57 each year from the year 1890 to the year 1898 himself did or employ to be done upon said ground and upon ground contiguous thereto for the benefit thereof work and improvements to the amount of at least $100 for each of said last named years.

Witness was familiar with said ground and was frequently upon it during the period last named and a part of the time within said period was employed on ground known as the Yosemite ground distant about 2,000 feet and in sight of the ground of said three claims. Witness was on said ground of said three claims in the year 1889 and knows that the said Uhlig No. 1 and Uhlig No. 2 locations were made on January 1st, of said last named year and witness was on the ground soon after the said last named date and saw all of the ground and knows that no other claims stakes, discovery points, notices or monuments were made or erected or posted in the year 1889, nor thereafter down to the year 1898, in any way conflicting with said ground of said Uhlig claims; and that witness was on the ground of said Mute No. 1 claim in the year 1891, after its location, and knows that there were no other claims shown by stakes or monuments or notices of any kind in conflict with said Mute No. 1 ground down to and including the year 1897. Witness saw the stakes which were set for the corners of said three claims for their respective boundaries and the same were marked each with the name of the claim whose boundary it indicated, and witness saw the discovery monuments on each of said three claims and the notices thereon describing each claim as located 1500 feet long by 600 feet wide. Witness knows of the movements of said Edmund H. Uhlig in relation to his living upon and

working said ground of said three claims and a part of the period from 1889 to the year 1898, said Uhlig lived with or near witness for periods of several months at a time. Witness saw Edmund H. Uhlig when he went to make the said locations of said Uhlig No. 1 and Uhlig No. 2 claims on the night of December 31st, A. D. 1888, and said Uhlig told witness that he was going to take said ground for the purpose of making said location.

Dated March 14th, 1901.

ALBERT W. CASEY.

Subscribed and sworn to before me this 14th day of March, 1901

[SEAL.] CHARLES D. SAVERY,
Notary Public in and for said Salt Lake County.

58 In the District Court for the Third Judicial District in and for the *the* County of Salt Lake, State of Utah.

G. LAVAGNINO
v.
EDMUND UHLIG ET AL. } No. 2285.

G. LAVAGNINO
—
J. M. GAREY ET AL. } No. 2451.

The motion of the defendants in each of the within causes for a continuance and trial of said causes is now submitted to the court by Mr. A. W. Casey for the defendants herein, and Messrs. Sonnedecker & Street for the plaintiff, and the court having duly considered said motions and being now fully advised in the premises, it is ordered that said motions be, and each of them is hereby overruled and denied; to which the defendants except.

Dated March 14th, A. D. 1901.

59 In the District Court for the Third Judicial District in and for *the* the County of Salt Lake, State of Utah.

G. LAVAGNINO
v.
G. LAVAGNINO.

Comes now Mr. John A. Street, and by leave of court first had and obtained, enters his appearance as associate counsel for plaintiff herein; and now come Messrs. E. B. Critchlow and Arthur Brown, and by leave of court first had and obtained, enter their appearance as associate counsel for the defendants herein, and the within cause coming on now regularly for trial, Messrs. Sonnedecker & Street ap-

pearing as attorneys for the plaintiff herein, and Messrs. Casey, Critchlow and Brown for the defendants; whereupon, all being ready, G. Lavagnino and J. Fewson Smith are sworn and testify in behalf of the plaintiff, and said evidence being objected to by the attorneys for the defendants herein, it is after due consideration by the court, ordered that said objection be, and the same is hereby sustained, and R. A. Hasbrouck is sworn and testifies in behalf of the plaintiff, and the plaintiff rests, and after the opening statement by the defendants herein, L. P. Burton is sworn and testifies in behalf of the defendants and the further trial of the within case is continued until tomorrow morning at the hour of ten o'clock.

Dated March 25th, A. D. 1901.

60–64 In the District Court of the Third Judicial District in and for the County of Salt Lake, State of Utah.

G. LAVAGNINO
v.
EDMUND H. UHLIG ET AL.

The attorneys for the plaintiff and the defendants herein all being present and ready, the further trial is now resumed; whereupon L. P. Burton, John V. Taylor, Dr. R. A. Hasbrouck and George A. Smith, are sworn and testify in behalf of the defendants; and the defendants rest; and A. P. Mayberry is sworn and testifies in behalf of the plaintiff in rebuttal, and the plaintiff rests, and the evidence being closed, said cause is submitted to the court without argument; whereupon it is now here considered, ordered and adjudged that findings of fact and decree be entered herein in favor of the defendants and against the plaintiff, adjudging and decreeing that the defendants herein are the owners of, in the possession, and entitled to the possession of the Uhlig No. 1 and Uhlig No. 2 Lode mining claims as described in the pleadings, and in accordance with the prayer of the defendants' answer herein.

Judgement entered in Judgment Book No. 8.

Dated March 26th, A. D. 1901.

65 In the District Court of the Third Judicial District of the State of Utah, County of Salt Lake.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN, Defendants.
} Proposed Amendments to Findings of Fact.

Now comes the above named plaintiff and objects to each and every finding proposed by and on behalf of the defendants, and moves the court as follows, to-wit:

1st. To add to the first proposed finding of fact, the following: to-wit: "But the evidence showed that the St. Joe Mining Company had succeeded to the property claimed to be owned by Edmund H. Uhlig and Alex McKernan, and had been substituted as the party defendant instead of these two persons."

2nd. To insert in lieu of the third proposed finding of fact, the following:

"That the plaintiff herein introduced evidence in support of his complaint, showing that J. Fewson Smith, Jr., a native born citizen of the United States, on the 1st day of January, 1898, located the Yes You Do mining claim by making a discovery of mineral-bearing rock in place, and posted a location notice at the discovery; that he properly staked the claim, placing stakes at the four corners of the claim, and that he recorded a copy of his location notice.

66 & 67

"That the area covered by the "Yes You Do" location was formerly covered by a location called the "Levi P," but two days before the 1st day of January, 1898, one Andrew P. Mayberry, the owner of the "Levi P," told J. Fewson Smith, that he had not done the assessment work for 1897, and was not going to do it, and Smith notified him that he was going to relocate the ground. That he performed upon the "Yes You Do" claim more than $50.00 worth of work within ninety days by sinking a shaft in blasting rock about thirteen feet deep and 4 x 6 feet wide.

"That G. Lavagnino, the plaintiff, had declared his intention to become a citizen of the United States before the "Yes You Do" claim was located.

"That it appeared in evidence before plaintiff's case was closed that J. Fewson Smith, Jr., was at the time of his location of the "Yes You Do" claim a United States deputy mineral surveyor, acting as such in the State of Utah.

"After the foregoing evidence had been admitted on behalf of plaintiff, counsel for plaintiff offered in evidence the recorded location notice of the "Yes You Do" claim, together with a deed to said claim from J. Fewson Smith to G. Lavagnino, the plaintiff, and said offer was objected to on behalf of the defendants, upon the grounds that under sections 452 and 2319 of the Revised Statutes of the United States, J. Fewson Smith, Jr., being at the time of the attempted location a United States deputy mineral surveyor, he could not make a valid location, and that the attempted location by said Smith was null and void.

"Thereupon the court sustained the objection to the admission of said recorded location notice, and said deed and placing its ruling expressly on the construction of said two sections of the United States statutes, held that said section 452 qualified said section 2319 to the extent that the right of J. Fewson Smith, Jr., to make the "Yes You Do" location would be prohibited as a matter of public policy, and, therefore, was null and void, and that the subsequent conveyance of

said "Yes You Do" claim to the plaintiff would not give any validity to the location.

"Thereupon plaintiff, reserving exceptions to the rulings of the court, offered in detail to prove the remaining allegations of the complaint, and the defendants, by their counsel, objected to the admission of such evidence upon the ground that the "Yes You Do" location, having been held invalid by the court, the said evidence offered was immaterial, and the court sustained the objection upon said ground, to which ruling plaintiff excepted."

68 Third. To strike out the following words from line 3 of the fourth proposed finding of fact, to-wit, "the unoccupied and unappropriated."

Fourth. To insert a finding as follows: "That the plaintiff, on rebuttal, offered to prove by competent evidence that on the 1st day of January, 1889, at a time antecedent to the alleged location of the said "Uhlig No. 1" and said "Uhlig No. 2" Lode mining claims, hat said Andrew P. Mayberry made a valid location of the two lode mining claims named the "Levi P" and the "Veta," covering the discoveries of both the "Uhlig No. 1" and the "Uhlig No. 2" Lode mining claims, and completely covering the area in conflict between the "Yes You Do" claim and the "Uhlig No. 1 and 2" Lode mining claims, and he continued in possession of the said "Levi P" and "Veta" claims, and performed all labor required by the United States and the rules of the West Mountain mining district, up to and including the year 1896, but the court ruled that the evidence was inadmissible, for the reason that the said Andrew P. Mayberry had filed no adverse claim in the United States office against the application for patent for the said "Uhlig No. 1" and the "Uhlig No. 2" Lode mining claims, and that the plaintiff was not entitled on his own behalf, or his counsel on behalf of the United States Government, to raise the question whether or not the ground covered by the "Uhlig No. 1" and the "Uhlig No. 2" Lode mining claims was lawfully occupied at the time of the purported location of said "Uhlig No. 1" and said "Uhlig No. 2" claims.

N. W. SONNEDECKER AND
DEY & STREET,
Attorneys for Plaintiff.

69 STATE OF UTAH, }
County of Salt Lake, } ss:

In the District Court of the Third Judicial District.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN, Defendants.

Findings of Fact and Conclusions of Law.

This cause came on regularly for hearing before the court on the 25th day of March, 1901, John A. Street Esq., and N. W. Sonne-

decker, Esq., appearing in behalf of plaintiff, and Arthur Brown, Esq., A. W. Casey, Esq., and E. B. Critchlow Esq., appearing in behalf of the defendant, The Saint Joe Mining Company, and the court having heard the testimony adduced by the respective parties, and having considered the same and the records and files in the cause, and the arguments of counsel, and being fully advised thereon, now makes and files the following as its

Findings of Fact.

1. That the plaintiff herein has failed and neglected to prosecute his action against the above named defendant, Alex McKernan, and that prior to the trial of this cause the said action of plaintiff as to the defendant Alex McKernan was by the court dismissed.

70 2. That after the commencement of this action, and before the trial of the same the defendant, Edmund H. Uhlig, assigned, transferred and conveyed to the St. Joe Mining Company, a corporation under the laws of Utah, all his right, title and interest in and to the premises in the complaint and answer herein described as the "Uhlig No. 1" and "Uhlig No. 2" Lode mining claims, and by an order duly entered in this cause the said St. Joe Mining Company was and is substituted in lieu of the said Edmund H. Uhlig as defendant herein.

3. That the plaintiff herein introduced upon the trial of this cause no legal or competent evidence to sustain the allegation- *to sustain the allegations* of the complaint, or to sustain the issues upon the part of plaintiff, and upon the trial, on motion of counsel for defendants, the said action of the plaintiff against the defendant was and is hereby dismissed.

4. That on or about the 1st day of January, 1889, one Edmund H. Uhlig, then and there a citizen of the United States, entered upon the unoccupied and unappropriated mineral lands of the United States in West Mountain mining district, Salt Lake county, State of Utah, and having discovered thereon a lode of mineral-bearing rock in place-bearing lead, iron, silver and other minerals, did then and there locate the same as the "Uhlig No. 1" and "Uhlig No. 2" Lode mining claims, by marking the boundaries thereof upon the ground by suitable monuments, so that the boundaries thereof could be readily traced, and by posting at the points of discovery upon said mining claims respectively notices of location, describing the same by reference to natural objects and permanent monuments; that thereafter he caused copies of said notices of location, respectively, to be duly filed and recorded in the office of the district recorder of said West Mountain mining district.

5. That thereafter the said Edmund H. Uhlig and the defendant, The St. Joe Mining Company, remained in possession of said mining claims, working and developing the same and causing to be done

thereon and for the benefit of said claims in each and every year up to and including the year 1900 the annual assessment work required by the laws of the United States.

6. That thereafter, by divers deeds properly executed and of record in the office of the county recorder of Salt Lake county, Utah, the said Edmund H. Uhlig conveyed all of said "Uhlig No. 1" and "Uhlig No. 2" Lode mining claims to the defendant, The St. Joe Mining Company, and to Alex McKernan, and that prior to the commencement of this action, to-wit, on the 24th day of August, 1898, the said Edmund H. Uhlig, the predecessor in interest of the Saint Joe Mining Company, and the said Alex McKernan, in due
71 form, made application for United States patent for the said "Uhlig No. 1" and "Uhlig No. 2" Lode mining claims in the United States land office at Salt Lake City, Utah, against which said application the plaintiff herein filed his adverse claim, and afterwards brought this action against the said defendants for the purpose of determining the title and right of possession of the premises set forth and described in the complaint herein as the area in conflict between the "Uhlig No. 1" and the "Uhlig No. 2" Lode mining claims, and the alleged "Yes You Do" mining claim.

7. That the full and complete description by metes and bounds of the said "Uhlig No. 1" and "Uhlig No. 2" Lode mining claims is as follows, to-wit:

With magnetic variation at 16 degrees 28 minutes east: Commencing at corner No. 1 of said "Uhlig No. 1" claim, and running north 20 degrees 12 minutes, west 145.5 feet to corner No. 4 of said "Uhlig No. 2" claim; thence north 50 degrees 38 minutes, east 1437.8 feet to corner No. 1 of said "Uhlig No. 2" claim; thence south 20 degrees 12 minutes, east 600 feet to corner No. 2 of said "Uhlig No. 2" claim; thence south 50 degrees 38 minutes, west 1437.8 feet to corner No. 3 of said "Uhlig No. 2" claim; thence south 20 degrees, 12 minutes, east 145.5 feet to corner No. 2 of said "Uhlig No. 1" claim; thence south 76 degrees 36 minutes, west 1151.9 feet to corner No. 3 of said "Uhlig No. 1" claim; thence north 20 degrees 12 minutes, west 522.9 feet to corner No. 4 of said "Uhlig No. 1" claim; then north 72 degrees 46 minutes, east 1145.3 feet to corner No. 1 of said "Uhlig No. 1" claim, the place of beginning.

The northwest corner of section 32, township 3 south, range 2 west, Salt Lake meridian, bears as follows: From corner No. 1 of said "Uhlig No. 1" claim, north 60 degrees 28 minutes, east 10,255.6 feet; and from corner No. 1 of said "Uhlig No. 2" claim, north 62 degrees 59 minutes, east 8823.9 feet.

From the foregoing facts the court finds as its

Conclusions of Law.

First. That the plaintiff, G. Lavagnino, is not entitled to any relief whatsoever in this action as against the defendants, or either of them,

and that the action against the defendants should be dismissed with costs against the plaintiff.

Second. That the defendant, The St. Joe Mining Company, and the defendant Alex McKernan are the owners in possession and entitled to the possession as against the *the* plaintiff and all other persons, excepting as against the United States, of the premises in the foregoing findings of fact described as the "Uhlig No. 1" and the "Uhlig No. 2" Lode mining claims, situate in West Mountain mining district, Salt Lake county, Utah, and that the said defendant, The St. Joe Mining Company, is entitled as against the plaintiff and against all persons whomsoever to proceed to purchase from the United States of America the said premises and the whole thereof.

72 Third. That a decree quieting the title of the defendant St. Joe Mining Company and Alex McKernan to the premises in conflict should be entered against the said plaintiff, and that the said defendant, The St. Joe Mining Company, should recover of and from the plaintiff its costs herein to be taxed.

Done in open court this 13th day of December, 1901.

WILLIAM C. HALL, *Judge.*

Attest: JOHN JAMES, *Clerk,*
By GEO. G. ARMSTRONG,
Deputy Clerk.

Filed December 13, 1901.

73 STATE OF UTAH, } ss:
County of Salt Lake, }

District Court, Third Judicial District.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN, Defendants.

Decree.

This cause having heretofore been brought on for trial before the court, plaintiff herein appearing by John A. Street, Esq., and N. W. Sonnedecker, Esq., and the defendant herein, The St. Joe Mining Company, duly substituted herein as party defendant by order of court in lieu of Edmund H. Uhlig, appearing by Arthur Brown, Esq., A. W. Casey, Esq., and E. B. Critchlow, Esq., and the court having heretofore rendered its decision, and having filed its findings of fact and conclusions of law,

Now, therefore, upon motion of counsel for defendants, it is hereby ordered, adjudged and decreed that the plaintiff herein take nothing by his said action, and that his complaint herein be and the same is hereby dismissed.

It is further ordered, adjudged and decreed that the defendant, The St. Joe Mining Company and Alex McKernan, are the owners in possession and entitled to the possession, except as against the paramount title of the United States, of all those certain premises situate in West Mountain mining district, Salt Lake county, Utah, known as the "Uhlig No. 1" and the "Uhlig No. 2" Lode mining claims, described by metes and bounds, with magnetic variation at 16 degrees 28 minutes east, as follows, to-wit:

Commencing at corner No. 1 of said "Uhlig No. 1" claim, and running north 20 degrees 12 minutes, west 145.5 feet to corner No. 4 of said "Uhlig No. 2" claim; thence north 50 degrees 38 minutes, east 1437.8 feet to corner No. 1 of said "Uhlig No. 2" claim; thence south 20 degrees 12 minutes, east 600 feet to corner No. 2 of
74 & 75 said "Uhlig No. 2" claim; thence south 50 degrees 38 minutes, west 1537 feet to corner No. 3 of said "Uhlig No. 2" claim; thence south 20 degrees 12 minutes, east 145.5 feet to corner No. 2 of said "Uhlig No. 1" claim; thence south 76 degrees 36 minutes, west 1151.9 feet to corner No. 3 of said "Uhlig No. 1" claim; thence north 20 degrees 12 minutes, west 522.9 feet to corner No. 4 of said "Uhlig No. 1" claim; thence north 72 degrees 46 minutes, east 1145.3 feet to corner No. 1 of said "Uhlig No. 1" claim, to the place of beginning.

The northwest corner of section 32, township 3 south, range 2 west, Salt Lake meridian, bears as follows: From corner No. 1 of said "Uhlig No. 1" claim; north 60 degrees 28 minutes, east 10,255.6 feet; and from corner No. 1 of said "Uhlig No. 2" claim, north 62 degrees 59 minutes, east 8823.9 feet.

And it is further ordered, adjudged and decreed that the title of the said defendants in and to said premises, and each and every part thereof, is hereby quieted and confirmed, as against the plaintiff and as against all persons whomsoever.

And it is further ordered, adjudged and decreed that the defendants herein, The St. Joe Mining Company and Alex McKernan, are entitled to prosecute their application to purchase from the United States of America all of said premises hereinbefore described.

And it is further ordered, adjudged and decreed that the defendant, The St. Joe Mining Company, do have and recover from the plaintiff its costs herein taxed at the sum of $14.30.

Done in open court this 13th day of December, 1901.

WM. C. HALL, *Judge.*

Attest:

JOHN JAMES, *Clerk,*
By GEO. G. ARMSTRONG,
[SEAL.] *Deputy Clerk.*

76 In the Third District Court of Utah, Salt Lake County, Department No. 1.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG ET AL., Defendants. } No. 2285.

Notice of Motion for New Trial.

To the defendants in the above entitled cause and to Pierce, Critchlow & Barrette, their attorneys:

You will please take notice that the plaintiff above named will move the court on the 31st day of December, 1901, or so soon as counsel can be heard, at 10 o'clock of said day at the court room of said department No. 1, in Salt Lake City to set aside the decision of said court herein and grant a new trial, for the following reasons:

1. Insufficiency of the evidence to justify the decision, and that the decision is against law.
2. Errors of law occurring at the trial excepted to by plaintiff.

The motion will be based upon the files, records and minutes of the court in said case.

N. W. SONNEDECKER AND
CHARLES C. DEY,
Attorney- for Plaintiff.

Service of a copy of the above accepted this December 26th, 1901.

PIERCE, CRITCHLOW & BARRETTE,
Att'ys for Defendants.

77 Third District Court Rooms.

JANUARY 6, 1902.

G. LAVAGNINO, Plaintiff,
v.
E. H. UHLIG ET AL., Defendants. } No. 2285.

N. W. Sonnedecker for plaintiff.
D. H. Wenger, for def't.

Whereas the parties hereto have this day submitted motion for new trial herein, and the court being fully advised thereon, it is now therefore ordered that the said motion of plaintiff for new trial be and it is hereby denied.

WM. C. HALL, *Judge.*

78 In the District Court of the Third Judicial District in and for the County of Salt Lake, State of Utah.

G. LAVAGNINO
v.
E. H. UHLIG ET AL. } No. 2285.

The motion for a new trial herein being now submitted without argument for the respective parties hereto, and the court having considered, and being now fully advised in the premises, it is ordered that said motion be and the same is hereby denied.
Dated January 6, 1902.

79 In the Third Judicial District Court in and for the County of Salt Lake, State of Utah.

GIOVANNI LAVAGNINO, Plaintiff,
vs.
EDMUND H. UHLIG, ALEX MCKERNAN, and THE ST. JOE MINING Company, Defendants.

Notice of Appeal.

To the defendants above named, and to D. H. Wenger, Esq., and Pierce, Critchlow and Barrette, their attorneys:

Please take notice that the plaintiff in the above entitled action hereby appeals to the supreme court of this State, from the decree therein made and entered in the said district court of the third judicial district, on the 13th day of December, 1901, in favor of the defendants in said action, and against said plaintiff, and from the whole thereof.

N. W. SONNEDECKER AND
C. C. DEY,
Attorneys for Plaintiff.

Service of the above notice accepted, and a copy thereof received this 25th day of April, 1902.

PIERCE, CRITCHLOW AND BARRETTE,
Attorneys for Defendants.

80 In the District Court of the Third Judicial District in and for the County of Salt Lake.

G. LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG and ALEX MCKERNAN, Defendants. } No. 2285.

I, John James, clerk of the district court, in and for Salt Lake county, State of Utah, do hereby certify that the above and foregoing and hereto attached files contains all of the original papers filed in this court in the case of Lavagnino *v.* Uhlig, *et al.*, No. 2285, including the original bill of exceptions and notice of appeal, together with true copies of the original orders made by the court thereon, the same constituting the judgment roll therein.

And I further certify that an undertaking on appeal, in due form has been properly filed, and that the same was filed on the 8th day of May A. D. 1902.

And I further certify that said judgment roll is by me transmitted to the supreme court of the State of Utah pursuant to such appeal.

Witness my hand and the seal of said court at Salt Lake City, Utah, this 12th day of May, A. D. 1902.

[SEAL.] JOHN JAMES, *Clerk*,
By GEO. G. ARMSTRONG, *Deputy*.

81 In the Third Judicial District Court (Division No. 1) in and for Salt Lake County, State of Utah.

GIOVANNI LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG ET AL., Defendants. } No. 2285. Bill of Exceptions.

This cause came regularly on for trial on Monday the 25th day of March, 1901, before Hon. William C. Hall, judge presiding.

Appearances.

For the plaintiff: N. W. Sonnedecker, Esq., and Messrs. Dey & Street.

For the defendants: Albert W. Casey, Esq., Messrs. Brown & Henderson, Messrs. Pierce, Critchlow, and Barrette.

Reporter's transcript of testimony and proceedings.

Marked: Filed after settlement, April 14, 1902. John James, clerk, dist. court of Salt Lake county, Utah, by Geo. G. Armstrong, deputy clerk.

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83 MONDAY, *March* 25, 1901.

Mr. SONNEDECKER: In this case and the following one, I desire the record to show that Judge Street is associated with me in behalf of the plaintiff.

The COURT: The record may show that fact.

Mr. CASEY: At this time I desire the record to show that Mr. Critchlow is associated with me in this matter, and also Senator Arthur Brown.

The COURT: The record may show those facts.

A brief statement of the issues involved in this cause was made to the court by counsel for the respective parties, after which the following proceedings were had:

GIOVANNIA LAVAGNINO, sworn on behalf of the plaintiff, testified as follows:

Examination by Judge STREET:

Q. What is your name?
A. Giovanni Lavagnino.
Q. Where do you live?
A. Salt Lake City.

Q. Of what country are you a native?
A. Of Italy.
Q. Did you at any time declare your intention to become a citizen of the United States?
A. Yes sir.

Mr. CRITCHLOW: We object to it as being incompetent—as being a matter which can be proven only by the records of the court, and we make this objection generally now to this whole class of testimony, should your honor be inclined to rule adversely to us, and we will take an exception to all this testimony.

The COURT: The court overrules the objection. The statutes of the United States, I take it, provide that the proof of citizenship can be made by the witness himself as to whether he is a citizen of the United States, native born or a naturalized citizen, or whether he has declared his intention to become such.

84 (Judge STREET:)

Q. I will ask you where you declared your intention to become a citizen of the United States?
A. In Leadville, Colorado.
Q. Do you know what county that is in?
A. In Lake, I believe.
Q. I will ask you whether at the time you declared your intention you received from the clerk of the court at that place any document with respect to it?

(Counsel exhibits a paper to witness)

A. Yes sir; that is the paper I received at that time.
Q. And is that your signature to the document?
A. Yes, sir; that is my signature, made at the time.
Q. Did you receive this from the clerk of the court?
A. Yes sir.

Judge STREET: We offer this document in evidence.

Mr. CRITCHLOW: We object to it, for the special reason that it is incompetent, not being authenticated as required by act of Congress and by the statutes of this State pertaining to the authenticity of the records of courts of sister States; and we object to the evidence generally for the reason that it is immaterial and irrelevant as to the testimony of this witness.

The COURT: This appears to be the original document that was issued to the witness respecting his declaration of intention to become a citizen of the United States. It appears to be under the hand and seal of a court of competent jurisdiction, and the objections will be overruled, and the paper introduced in evidence in connection with the testimony of the witness.

Exception by counsel for the defense.

85 Document above referred to, which is marked by the reporter "Plff't'f's Ex. No. 1—J. W. P. March 25th, 1901" reads, as follows:

STATE OF COLORADO, } ss:
County of Lake, }

I, Giovanni Lavagnino, do solemnly declare on oath to Charles W. Taylor, clerk of the district court of the fourth judicial district of the State of Colorado, in and for the county of Lake, that it is *bona fide* — intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, State or sovereignty whatever, and particularly to Humbert, King of Italy, whereof I was heretofore a citizen or subject.

(Signed) GIOVANNI LAVAGNINO.

Subscribed and sworn to before me this 23rd day of August, 1880.

CHARLES W. TAYLOR, *Clerk*,
By WM. RAYMOND, *Deputy Clerk*.

STATE OF COLORADO, } ss:
County of Lake, }

I, Charles W. Taylor, clerk of the district court of the fourth judicial district of the State of Colorado, within and for the county of Lake, do hereby certify that the above is a true copy of the declaration of Giovanni Lavagnino, an alien, duly made before me, and filed in my office on the 23rd day of August, A. D. 1880.

Given under my hand and the seal of said court this 23rd day of August, A. D. 1880.

[SEAL OF COURT.] CHARLES W. TAYLOR, *Clerk*.
By WM. RAYMOND, *Deputy Clerk*."

(Judge STREET:)

Q. Now, out of its order: Did you purchase the Yes You Do mining claim?

A. Yes sir.

Q. From whom?

A. J. Fewson Smith, Jr.

Q. I will ask you whether that is the original deed you received from Mr. Smith? (Exhibiting paper to witness.)

A. Yes, sir:—

(Mr. CRITCHLOW:)

Q. I see the consideration is one dollar. Was that the amount of the consideration paid?

Judge STREET: We object to that as irrelevant and immaterial.

The COURT: What is the object of that?

Mr. CRITCHLOW: To show that the deed is not a competent deed under the act of Congress. It has no revenue stamp on it; and if it exceeds in value more than $100, it would require a revenue stamp on it.

86 The COURT: Proceed with your examination.

(Mr. CRITCHLOW:)

Q. Is that the amount of consideration you paid $1?
A. No sir.
Q. Did you pay any consideration?
A. Not yet.
Q. Then Mr. Smith still——
A. (Interrupting.) I paid money, but not to Mr. Smith as a consideration—not yet.
Q. Then he still has an interest in the property?
A. Well, I have an agreement with him as to what I have to pay.
Q. This agreement is in writing?
A. I think it is.
Q. Well it is, of course, isn't it?
A. I didn't happen to see it since then; but I think I must have it somewhere.
Q. Are those premises not worth more than $100?

Judge STREET: We object to that as irrelevant and immaterial.

The COURT: I suppose, under the act of Congress, they object to the deed in evidence, as being entitled to be received as such because it has not been stamped according to law.

Judge STREET: In order to entitle the deed to record, perhaps, it might under certain circumstances require a revenue stamp; but as to passing title between the parties where the title to the claim is not litigated at all, and where there is simply an area in conflict, I insist the instrument is competent.

The COURT: I have held, where the parties have failed to stamp a deed through inadvertance or through some misunderstanding, that they could at the present time place the stamp required on it by the revenue act to entitle the paper to be received in evidence. The authorities differ on that, but I have held that once before.

87 Judge STREET: We would not offer it at this time, then, if your honor please. We will hold it until we ascertain the facts with respect to it. I am certain that there was no attempt to evade the internal revenue law on this deed. We desire to ascertain the facts with respect to it, and we can offer it later.

Mr. CRITCHLOW: In order to keep the record straight, I move to strike out all the testimony of the witness in regard to his declaration of intention to become a citizen of the United States.

The COURT: The motion will be overruled.

Exception by counsel for defense.

J. FEWSON SMITH, JR., sworn as a witness on behalf of the plaintiff, testified as follows:

Examination by Judge STREET:

Q. Your name is J. Fewson Smith, Jr.?
A. Yes, sir.
Q. Where do you live?
A. This city.
Q. Are you a citizen of the United States?
A. Yes, sir.
Q. Native born?
A. Yes, sir.
Q. Did you locate the Yes You Do mining claim in the West Mountain mining district?
A. Yes, sir.
Q. When did you locate it?
A. 1898.
Q. What day?
A. 1st of January.

Mr. CRITCHLOW: I suppose this is merely preliminary, and not to prove the ultimate facts?

Judge STREET: Yes; we simply identify him as the person who did so.

(Judge STREET:)

Q. On the day that you located the claim did you make any discovery of mineral bearing rock in place?
A. Yes.
88 Q. State what you did with respect to posting notices, if anything?
A. I posted a location notice at the discovery.
Q. Did you record or file for record a copy of that notice?
A. Yes, sir.
Q. What did you do with respect to staking your claim?
A. I staked—put stakes at the four corners of the claim.
Q. As described in the notice?
A. Yes, practically.

Mr. CRITCHLOW: We object to that as being a conclusion. He should state where he placed them.

(Judge STREET:)

Q. Did you describe the location of your stakes in your notice?
A. Yes sir; I did.

The COURT: Let the witness state what he did.

(Judge STREET:)

Q. What is your profession?

A. A surveyor.
Q. Are you a United States deputy mineral surveyor?
A. Yes sir.
Q. Have you prepared a map which correctly shows the location of the Yes You Do claim with respect to any surrounding or adjoining patented ground?
A. Yes sir.
Q. What claim, what patented claim, did you tie to?
A. The No You Don't, lot No. 992.
Q. That is the same claim that is mentioned in your location notice is it not?
A. Yes sir.
Q. Now I will ask you to examine this copy and state whether or not it is a copy of the notice that you posted and recorded? (Exhibiting a paper to witness)
A. Well that seems to be a correct copy, as near as I can remember the description of the boundaries.

Judge STREET: We desire to offer this certified copy.
Senator BROWN: We want to cross-examine him first.
The COURT: You may cross-examine him upon it.

89 (Mr. CRITCHLOW:)

Q. You located or attempted to locate this ground, when?
A. The 1st of January, 1898.
Q. Were you yourself on the premises at that time?
A. Personally—yes, sir. I was there.
Q. At that time?
A. I waited there till the whistles blew for midnight, and then I put up my notice—waited some little time, to get into the New Year.
Q. You say you are a civil engineer and deputy surveyor?
A. Yes sir.
Q. Were you such at the time?
A. Yes sir.
Q. And had been for a number of years?
A. Yes sir.
Q. What years—since when have you been a deputy United States mineral surveyor?
A. I can't tell you—sometime between seven and twelve years. I became a deputy United States mineral surveyor about the time the first Liberal administration was inaugurated.
Q. About 1891.
A. I believe that is right.
Q. What you mean by deputy United States mineral surveyor is, attached to the office of the surveyor general for the district of Utah?
A. Yes, that explains it.

Q. You have stated that you put up some corners on this claim. Did you put up any?

A. I put up the corners—yes sir.

Q. Tell me where you put up the discovery stake, if you did put one up?

A. If I did?

Q. Yes.

A. I put it up, where?

Q. Describe it on the ground. What kind of a place was it on the ground?

A. Why, it was in the neighborhood—within a few feet, I mean of what appeared to me in the moonlight as a place where work had been done on the top and some little distance from the edge of a very conspicuous prominent quartzite outcrop.

90 Q. How long was this quartzite outcrop?

A. I can't state exactly how long. It was a very conspicuous blow-out.

Q. Was it half a mile long?

A. Oh, no, no; just a few feet—less than fifty feet.

Q. In length?

A. In length.

Q. Did you put up a stake there that night?

A. Yes—well, yes; I put up a board nailed to a stake.

Q. What kind of a board?

A. I think I put up a 12 inch pointed board. It wasn't nailed to a stake as I recollect.

Q. Did you put up a stake?

A. Well, that was the stake. No, I don't believe I did put up a stake. A small upright stick I believe I used, with a 12 inch board, pointed; although it might have been that I nailed such a board to the stake.

Q. Did you put up that notice that night?

A. Yes sir.

Q. And you took a copy of it and recorded it did you?

A. I made the notice out in duplicate before going on the ground.

Q. You were familiar with the ground then, were you?

A. Yes sir.

Q. How did you come to be familiar with it?

A. From having made surveys in that country and all through Bingham.

Judge STREET: I understood that was a special cross-examination as to this notice. I hadn't completed my examination of the witness, and the scope of the cross-examination seem- to be not that of examination on the *voir dire* as to the admissibility of the evidence, but a general cross-examination.

Mr. CRITCHLOW: Isn't your offer of the notice as a document? Isn't that what you offer? That is what we want to cross-examine him upon.

91 Judge STREET: Yes; but you seem to be going into a general cross examination.

The COURT: The examination in chief of the witness was confined to the discovery of a vein of rock in place carrying mineral, putting up stakes at the four corners, and the posting of the discovery notice and the recording of the copy. That was the extent of the examination in chief.

Senator BROWN: We don't care so much about whether it is cross-examination of what he said in chief, but it is with a view of determining whether this paper is admissible; therefore we think we have a right to cross-examine him upon anything which would bear upon the admissibility of the paper itself.

The COURT: The court so understands, and will afford you that opportunity.

(Mr. CRITCHLOW:)

Q. You say that you know in a general way this ground from having made mineral surveys?

Judge STREET: We object to it as not proper cross-examination at this time in view of the fact that we haven't turned the witness over to the defense.

The COURT: I think, under the circumstances, the witness had better be handed back to the other side and let them complete his examination.

Mr. CRITCHLOW: Very well.

Judge STREET: We offer the notice.

Senator BROWN: We object to the notice. We want some more examination before the notice comes in.

The COURT: The court will hold that the party calling the witness will examine him fully as to the discovery and what he did towards the location of this claim before he makes that offer.

92 Judge STREET: We submit that we have shown what the United States statutes calls for as preliminary to offering the notice.

(Judge STREET:)

Q. What did you do with respect to performing the work on the Yes You Do lode after having made your discovery and staked out your claim?

A. I proceeded to perform $50 worth of work within a period of ninety days.

Q. State where you did that work?

A. It was done just practically at the discovery—just a little bit to the northerly from the discovery, within a few feet.

Q. How much work was done there?

A. I think there was a 13 feet of a shaft sunk, an incline shaft—about that.

Q. What class of work was this?

A. In rock.
Q. How many feet?
A. About 13; that is my recollection.
Q. Of what character of work?
A. Why it was blasting rock, and the shaft was about 4 x 6 feet, thereabouts average up.
Q. Did you do the work yourself, personally?
A. You mean, perform the manual labor?
Q. Yes.
A. No sir.
Q. Did you pay for it?
A. Yes sir.
Q. How much did you pay?
—. $51 and some cents.
Q. Who performed this work?
A. A man named Despain, a man whose name I don't recollect now, and a man named Thomas Pells.
Q. Did you know at the time you located this ground of a claim called the Levi P. Had you examined as to the location of that claim?
A. Why——
93 Q. (Continuing:) I mean where it was located on the ground?
A. I had inquired.
Q. Of whom?
A. Of Mr. A. P. Mayberry.
Q. Do you know whether or not he was the owner of the Levi P. claim previous to the time you located it?

Mr. CRITCHLOW: We object to that as incompetent, and not the proper way to show ownership.
Judge STREET: We will supplement it. It relates to the abandonment of the Levi P. claim, and we will supplement it with proof that Mr. Mayberry was the actual owner of the Levi P. claim up to the time of this abandonment.
The COURT: Is that claim or a portion of it within the exterior boundaries of the Yes You Do?
Judge STREET: The Yes You Do is entirely within the boundaries of the former claim the Levi P., and it purports to be a relocation of the Levi P.
The COURT: Does the notice of location have any reference to the Yes You Do being a relocation of this claim?
Judge STREET: Yes, it purports to be a relocation of the Levi P. in the notice.
The COURT: It seems to me that you would have to show that that claim had been abandoned or was subject to relocation at the time you made your location.
Judge STREET: We expect to do it in our direct case.
The COURT: You may proceed.

A. I say I inquired. I can't answer just to that question. I knew Mr. Mayberry had located the claim.

Q. And did you know he was claiming the ownership of that claim?

94 A. I knew he was claiming the ownership up to the time when I made the relocation.

Q. Before you made the location of the Yes You Do lode, state whether anything was said to Mr. Mayberry with respect to any intention to further claim or work the Levi P. lode.

Mr. CRITCHLOW: We object to that as being incompetent, for the reason that it is hearsay as against us.

The COURT: From the statement made by Judge Street, that he expects to supplement the testimony of the witness by showing that Mr. Mayberry was the owner of the Levi P., it is admissible to show the intention of the owner, as to whether he intended to, or rather had abandoned the claim, and did'nt intend to represent it, as bearing upon the question of forfeiture and right to relocate.

Mr. CRITCHLOW: I don't understand that Mr. Street's offer is to show anything in the way of forfeiture, but to show something in the way of abandonment. If it were to prove forfeiture, it would be immaterial and irrelevant; if it were to prove actual abandonment, that would be another matter.

The COURT: I don't know what the witness will testify, and don't know what Mr. Mayberry may have said. His statements might possibly bear upon either issue. I will let him answer the question, and give you an exception.

A. Mr. Mayberry said to me that he was pretty sick of doing assessment work and paying for assessment work on certain claims, and in talking about the claims the position of this particular claim came up; and I was a little surprised that he——

Q. Tell what he said?

A. He said he was going to discontinue doing and paying for assessment work on certain claims, and this claim was one of them; and he stated that to me on two occasions, the last being the

95 day before the New Year. I asked him—well, I think I asked him, at least he told me that he had not done the work, and what was more he wasn't going to do the work. I said "Then I will go and locate it." That is the substance of the conversation.

Mr. CRITCHLOW: We now move to strike that out, because it appears from the testimony of the witness that it is not a statement of abandonment by Mr. Mayberry, but simply a statement on his part that he didn't think he would continue his assessment work. Of course, I don't have to go into any explanation or argument upon the difference between abandonment and forfeiture. If this ground was forfeited by failure to do the work for 1897, so that it became open to relocation, then no statement upon the part of Mr. Mayberry is

necessary to complete the forfeiture, and the statement, whatever it was, becomes immaterial. If they claim that he located this because at the time he located it it was upon an existing and valid claim under the mineral laws of the United States excepting the fact that it was then and there abandoned by Mr. Mayberry, then probably your honor would be correct in holding that his actual statement, that he did then and there abandon it, would make it revert back to the mineral lands of the United States and make it subject to relocation. I move therefore to strike out that testimony as immaterial and irrelevant.

The COURT: Abandonment is a question of intention. The owner of the land stated in conversation with the witness that he was tired of spending money to pay assessment work upon a number of mining claims, and this one among the number. Subsequent to that, and a few days before the termination of the year, he also
96 stated to the witness that he hadn't done the assessment work upon this claim, and that he didn't intend to. I think it has a bearing upon both propositions; at least, within two days of the time within which the assessment work should have been done, the owner said that he hadn't done it and didn't intend to do it. I will let it stand.

Exception by counsel for defense.

(Judge STREET:)

Q. Have you platted on the map that is hibited here the location of the Yes You Do claim?

A. Yes sir.

Q. With reference to the No You Don't, lode, lot No. 99.

A. Yes sir.

Q. Does that map correctly show the location of the Yes You Do claim with reference to the No You Don't and with reference to the description in your location notice that you posted on the ground?

A. Yes sir.

Q. And also the notice you recorded?

A. Yes sir.

Q. What is the section of the map in blue?

A. The blue boundary and color shows the Uhlig No. 1, survey No. 3683.

Q. I ask you about the solid mass of blue?

A. That shows the area in conflict between the claim I mentioned and the Yes You Do.

Q. And the area, the solid area in green which is shown on that map?

A. The area in conflict between the Uhlig No. 2, survey 3684, and the Yes You Do.

Q. The Yes You Do appears within the heavy red lines, does it?

A. Yes sir.

97 Q. And the Uhlig No. 1 between the heavy blue?

A. Yes sir.

Q. And the Uhlig No. 2 between the heavy green lines?

A. Yes sir.

Q. From what data did you plat the Uhlig No. 1 and the Uhlig No. 2, including the respective areas in conflict?

A. From the official records in the surveyor general's office and my own ties to those claims.

Q. And the No You Don't—where did you get the data to plat that?

A. The same source.

Q. I find on this map what is ordinarily shown on maps as a ridge line——

Senator BROWN: I object to that statement, as to the ridge line.

Question withdrawn.

(Judge STREET:)

Q. I show you, running through the map towards the lower right hand corner an irregular line, running from the Uhlig No. 2, the area in conflict between the Uhlig No. 2 and the Yes You Do, through the Yes You Do, to the right of the discovery, up into the No. You Don't, and coming around through the No You Don't through the left hand corner of the Yes You Do, down through and almost parallel with the Uhlig No. 1, state what that is?

A. That is an etched line representing the outline of a rid-e.

Q. I show you on the Yes You Do claim a circle and some surrounding marks, with the word "Disc." What do those marks represent?

A. The "Disc." is the discovery, which is the discovery point of the Yes You Do.

Q. Is that where you placed your discovery notice?

98 A. Yes, sir; the one with the white space.

Q. I show you a round top with "Disc." on the Uhlig No. 1?

A. That is the discovery of the Uhlig No. 1, as surveyed for patent.

Q. As shown by the records in the surveyor general's office?

A. Yes sir; that is the official record.

Q. I show you on the lower part of the map an irregular line forking at the upper part, marked "St.'s Rest gulch."

A. That is Saint's Rest gulch.

Q. And the latters "Disc." on the Uhlig No. 2, what does that mean?

A. Discovery of the Uhlig No. 2 as shown by the official survey in the land office and in the surveyor general's office.

Judge STREET: We offer this map, in evidence. Any objections?

Mr. CRITCHLOW: For the purpose of illustrating the testimony of the witness, no.

(Map marked by reporter "Pl't'ff's Ex. No. 2. J. W. P.")

(Judge STREET:)

Q. I show you another map, and ask you whether you prepared this?

A. Yes sir.

Q. Does that map correspond to the location of the No You Don't——

Senator BROWN: We object to that. Ask him to explain it.

Judge STREET: I think I have the right to close my question before Mr. Brown objects.

Senator BROWN: Every question put on the other map was what certain lines meant.

The COURT: The attorney calling the witness has the right to put his question, and the attorneys on the other side, if they have objection, have the right to put their objection, and the court will pass on the question.

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Senator BROWN: We object to it on the ground that it is leading and attempting to pick out particular things on the map, instead of asking the witness to explain.

Judge STREET: I have the right to complete my question.

The COURT: You have that right.

(Judge STREET:)

Q. Does this map correspond as to the platted locations of the No You Don't, the Yes You Do, the Uhlig No. 1 and the Uhlig No. 2 with the map you have already testified to as Exhibit No. 2, and which you have said is correct?

A. Yes sir.

Senator BROWN: I have already stated my objection to it. I will make it now.

The COURT: He is asking him as to the correspondence of the surface lines of the same claims on the second map wit- those on the first map. I think he may answer the question.

Exception by counsel for defense.

(Judge STREET:)

Q. I find on this map—we will call this Exhibit No. 3 for the plaintiff—I find other claims and other marks than on Exhibit No. 2. I ask you to explain what those different marks are?

A. On the first, we had no Spring lode, No. 337.

Q. What is that?

A. It is a patented claim.

Q. State where you got the data to exhibit the Spring lode on this map?

A. From the official records in the office of the surveyor general.

Q. Is it correctly platted on that map?

A. Yes, sir.

Q. What others do you find?

A. The location corners—three of the location corners of
100 the Yes You Do are shown on this map, but not on the first map; also, there are improvements, which I have marked A, B. C. and D. That is all on this map and not on the others,—improvements at the points which I have marked A. B. C. and D., tunnels, excavations of some kind, that are not marked on the other map.

Q. How did you get the data for platting those excavations or improvements?

A. From a survey of my own.

Q. On the ground?

A. On the ground.

Q. I find something that is marked the Levi P. location?

A. Excuse me. There is one further point. On the first map I had another gulch which runs near to the northeast end of the Uhlig No. 2. I put it there simply by approximation. It might be 100 feet away, but I put it in by guess from the point marked No. 1. That doesn't appear on this claim. I believe that is the Revere gulch.

The COURT: When you refer to the maps, refer to one as Exhibit No. 3 and the other as Exhibit No. 2.

(Judge STREET:)

Q. I ask you what you have sketched on this map as the Levi P. location—on this Exhibit No. 3?

A. The brown boundaries are those of the Levi P. location and of the Veta location, on Exhibit No. 3, which do not appear on No. 2. I think that is everything.

Q. Where did you get your data to plat the Levi P. location and the Veta location?

A. From information furnished by Mr. Mayberry, the location notice, and points on the ground; I won't say corners.

Q. Have you platted the location of the Levi P. discovery?

A. Yes, sir; it is marked "Levi P. disc."—that little shaft which I have located with the instrument.

101 Q. Where did you get your data upon which to plat that?

A. As I stated, my own tie to the shaft, and information furnished by Mr. Mayberry.

Judge STREET: We offer Exhibit No. 3 in evidence.

The COURT: If there is no objection it will be received.

(Received in evidence without objection, and marked "Pl't'ff's Ex. No. 3—J. W. P.")

(Judge STREET:)

Q. Did you survey the Yes You Do before you platted it? Did you make the adverse survey in this matter?

A. Oh yes.

Q. I find that on the upper line of the Yes You Do, as platted on Exhibits 2 and 3, there is a bend or angle. Please state how that happens to be there?

A. The position of corner No. 2 of the Yes You Do is determined from that of the discovery. I thought when I located the discovery that we were about 300 feet from the side line of the No You Don't. The survey determined that we were more. We could only take 300 feet from the discovery, and that explains the way the corner comes the way it does.

Q. Do you know points that are called the fork of main Bingham canyon and Bear gulch?

A. Yes sir.

Q. In what direction does this claim, the Yes You Do claim, lie from the fork of main Bingham canyon and Bear gulch?

A. It would be southerly and easterly—southeasterly.

Q. Can you say at this time approximately, how far?

A. Between 1500 and 2000 feet; perhaps over 2000.

Q. Over 2000 feet.

A. From the discovery.

Q. At the time you made that location, did you, as nearly as possible——

Objected to as leading.

102 Question withdrawn.

Q. At the time you made your location, can you refresh your recollection ans state whether or not you estimated the distance between the fork of main Bingham canyon and Bear gulch and the Yes You Do claim?

A. Why, for good reason, I did not.

Q. I ask you to examine the copy of the notice of location which you have already testified to, and ask you whether the description you give with reference to the main Bingham fork, in the lower part of the notice, was as nearly correct at that time as you could make it?

Mr. CRITCHLOW: We object to that as a conclusion, until after we have examined him.

The COURT: He can state if he has estimated the distance from the Yes You Do claim to some natural object or permanent monument.

Senator BROWN: We don't object to that question; but this is another one.

The COURT: Is this a different notice from the Yes You Do?

Judge STREET: This is the Yes You Do notice.

Senator BROWN: The question is whether it is correctly described, according to the best he could do.

(Question last propounded read by reporter.)

Judge STREET: It is only offered as to the intent of this matter. I don't think it is very material myself.

The COURT: The witness would be entitled to answer as to that distance. Ask him the distance from the claim to this point.

Judge STREET: I will withdraw the question.

103 The COURT: You have the right to show it. The form of your question may not be proper, but he can answer the gist of it.

Judge STREET: I will withdraw the question.

(Judge STREET:)

Q. You have stated in answer to my questions that the distance might be 1500 or 2000 feet or more. I find in your location notice that you describe it as southeasterly 2600 feet from the fork. Have you any explanation to make with reference to the distance you have testified to and this location notice?

Senator BROWN: It seems to me he is assuming something; he is not properly presenting the question in this way; he can't at this time present it in that way. He had some good reason he says, for not estimating the distance. He either had the exact measurement, or he was shutting his eyes to it. Surely, this question does not tend to explain what the good reason was. I think it is improper.

The COURT: The court won't undertake to pass upon it as a bar or a good reason, for he does not know what it is. I think he may answer the question.

A. The last form of the question is it?

Exception by counsel for defense.

(Question last propounded read to witness by reporter.)

A. Yes sir; I would like to. I thought at the time of making the location that I was required to give some natural bearing object other than patent ties. Later I found that the patent tie was good enough; but in this case I gave both the patent tie and the tie to the fork. I have made surveys and maps of the neighborhood, and I took a map and I scaled the distance, as I remember; in fact, I am quite confident I scaled the distance and approximated the course. It was simply done to conform with my idea of what was required by a natural bearing object.

104 Judge STREET: With the privilege of recalling the witness after we take further evidence with respect to work upon the claim, we close his testimony at this time by offering the location notice of the Yes You Do claim. We think the location notice is competent to be admitted now, subject, of course, to anything th-t is brought out on cross-examination. A *prima facie* case is made to admit it.

Mr. CRITCHLOW: We ask to cross-examine him, just as we were proceeding to when Mr. Street resumed his examination.

The COURT: You can cross-examine.

Judge STREET: We take an exception.

Mr. CRITCHLOW: Note an exception.

The COURT: What are you excepting to?

Judge STREET: To the refusal of the court to admit the offered exhibit at this time.

The COURT: I didn't know that any objection was made. I thought Mr. Critchlow was going to examine the witness. If he has no objection it will be admitted.

Mr. CRITCHLOW: The testimony is in the position it was before. We objected to it, and said that we had the right to cross-examine him upon the notice before it was admitted, and we were proceeding to do so when your honor suggested that the witness had better go back to Judge Street. He again offers the notice now, and we again wish to examine him upon it.

The COURT: Without any cross-examination of the witness upon the objection made to the notice the court is of the opinion that unless the offer is made with the privilege to supplement the testimony of this witness upon the question of forfeiture, if you stand on that as well as abandonment, the court would sustain the objection, because the proof of forfeiture is not sufficient.

Judge STREET: Note an exception.

The COURT: You understand, Judge Street, that the ruling of the court is based upon the question of forfeiture.

Judge STREET: I understand, your honor, and we will reoffer the exhibit afterwards.

Cross examination.

By Mr. CRITCHLOW:

Q. How deep was the snow upon the ground on the 1st of January, 1898?

A. On the Saints Rest Gulch side, so far as I traversed it there was no snow at all. On the other side it was pretty deep. I don't think I got to the bottom of it.

Q. How deep was it then at the place you have marked on the map Exhibit No. 2 discovery of the Yes You Do?

A. My recollection is that there was none at all; there might have been a little. It was no inconvenience in going over. I don't think there was any snow.

Q. Did you at that time place a monument at the exact point where you now have run it?

A. Yes sir; I had to—I put my notice up on the board, and I didn't lay the board down. I found plenty of stones to do it. That is one reason that I am pretty dead sure. I remember now there was no snow on the portion of the outcrop from which I carried the rocks to fasten my stake. It was set in among the rocks.

Q. Then you didn't put your stake right on the outcrop?

A. Not on the bluff itself, but practically on it, within 30 or 40 or 50 feet of the actual edge of the bluff.

106 Q. Which way, north or south?

A. I went out on to the bluff, towards the main ridge, almost at right angles at the ridge. It would be practically north

Q. You put your stakes north of the bluff?

A. Practically on the bluff. There is, of course, a big shelf coming out. I put my stake in from the edge of the bluff where I could walk up on the soil to the place.

Q. Which way—north or south?

A. *North from the extreme edge of the bluff.*

Q. Did you know anything about the discovery of the Levi P. at that time?

A. I understood at that time that I was getting it just where the discovery of the Levi P. was. I thought I was.

Q. Did you see any shaft there?

A. I saw evidence of work there.

Q. Did you put it where you saw the evidence of work, this new location of yours?

A. Within—I can't remember exactly. I found the work there within less than ten feet away.

Q. Can you remember whether you put it right at the evidence of the work?

A. No, I wouldn't put it right on the work.

Q. What is the distance between what you have marked on the map Exhibit 2, as the discovery, and this other mark which lies to the northeast of that, which is evidently marked for a shaft?

A. That is the discovery of the Levi P., but I haven't got it marked on the map as such. It is about sixty feet away from that.

Q. That thing that you have got marked on Exhibit No. 2

107 just north of the discovery in the place where you saw the work?

A. No sir; I am very sure of that. I didn't go to the discovery of the Levi P. as I know it to exist.

Q. Did you take pains at the time you attempted to locate the Yes You Do to get the discovery down in this triangle here which is open?

A. No sir; I had got up in locating it within ten feet. Any where in that neighborhood was good enough for me. It just happened that it came there.

Q. Where did you place your corners on the Yes You Do. Or did you place any corners at all?

A. When I put my corners up I put them at the points I have indicated on the map.

Q. On the ground where did you put them?

A. At the points I have indicated in Exhibit No. 3.

Q. When did you do that?

A. Inside of 30 days.

Q. How much inside?

A. Before the end of January. I can't name the date.

Q. You put up the corners marked 2, 3, 4 5 and 1, did you?
A. No.
Q. What corners did you put up?
A. I put up the corners marked "L. C" and shown on the map as L. C.
Q. Which map?
A. On Exhibit 3.
Q. You didn't put the corners then at the places which are marked 2, 3, 4, 5 and 1 on Exhibit No. 2?
A. Not all of those corners—no sir.
Q. You did put them at other and different places which are marked on Exhibit No. 3?
A. Yes sir.
Q. And they are marked on Exhibit 3 in what manner?
A. As L. C., being the southeast corner, being situated
108 within the boundary of the Veta location, and below the ridge.
Q. How far? How many feet from corner No. 4 of the present survey of the Yes You Do is that situated?
A. 450 feet.
Q. 450 feet distant from the present corner of No. 4 of the Yes You Do?
A. Yes sir.
Q. Where did you put the next corner?
A. The next corner I put on the ridge practically, on the ridge near to corner No. 3 southwesterly a short distance from corner No. 3 of the Uhlig No. 1 as surveyed for patent.
Q. How many feet distant from corner No. 5 of the Yes You Do as at present surveyed?
A. About 200 feet.
Q. In a southwesterly direction?
A. Yes sir.
Q. How far is it from the first corner that you spoke of, to-wit, the southeast corner, as you say you located it, to the second corner, the southwesterly corner?
A. 1800 feet.
Q. Where did you put your next corner?
A. Well, I am not able to describe it now, but the other corner was identical with the corner 2 of the No You Don't, lot 99.
Q. You put it there because that was the corner stake of the No You Don't?
A. Yes sir.
Q. Did you know that the corner stake of the No You Don't was there?
A. Yes sir.
Q. Where did you put the next corner?
A. I set that as nearly as I could—in fact, I set it about at corner No. 3 of the No You Don't, lot 99.

Q. When first did you draw in the line between corners 1 and 3 so as to make this indentation.

A. At corner 2?

Q. Yes?

A. When I made the survey for protest and found that it had to be drawn in.

Q. It had to be drawn in?

A. Yes, sir; I don't remember the date. It was the day of making the survey for protest, though.

109 Q. Why didn't you continue the line 1 and 2 on its course?

A. Well, for the simple reason that I had described that corner as being identical with the corner of the No You Don't and because I wanted to hold my claim just as close to the No You Don't as I could possibly keep it.

Q. When was it you made this survey for protest?

A. I can give you the date, but I don't remember. It was on August 23rd, 1898, I believe. I made surveys there on August 23rd 1898. I did this when I had time. I think that is the survey I used for the protest. I will give that as the date.

Q. August 23 1898?

A. Yes sir.

Q. You were the owner of the claim at that time, were you, when you made this protest survey?

A. At the time when I tied to the corners I believe I was. I would like to explain if I can, without interrupting too much, that I made ties at different times when I had leisure; no one was paying me for that; and from those ties I composed the protest plat; so that it is quite likely that I still owned it when I made these surveys which I used later to get out my protest plat.

Q. What I want to know is, when it was that you drew in that line and made a corner No. 2 there, which you didn't have in your original location?

A. Well, it was when I made—it was in making the plat for protest when I drew it in. I never put a corner there.

Q. When did you make the plat for protest?

A. Well, I would have to look up some of the old Jordan books to find the date.

110 Q. Don't you remember when you caused it to be filed in the land office?

A. No, sir; I don't. Mr. Sonnedecker, I think, has the record He can give it to you.

Q. The statement in the pleadings in this case is—I will state for your information—the 24th day of August, 1898. Was that the time you made the protest plat, or prior to that time?

Judge STREET: That is the defendant's filing, not the plaintiff's

(Mr. CRITCHLOW:)

Q. Did you make the protest plat before the defendants filed their notice of application for patent in the land office, or afterwards?

A. Why, before they filed their application I had made surveys and tied up to my corners, and I did it, I believe, before the application was made.

Q. I am trying to find the time, when it was, if you can tell me, when you drew in this line and concluded that the line didn't run from 1 to 3 straight, but ran from 1 to 2 then from 2 to 3. If you are unable to give it, say so?

A. I would fix it that way. I originally thought, before I made my ties, that I held all the ground up to the No You Don't line, and I would try to represent it that way until I knew from a survey that it was wrong. It was summer time, and the day I made the last survey was August 23rd; it was between that time that I made surveys and plats at different times.

Q. And you drew it in?

A. Yes sir.

Q. Then it was on your own motion that you drew in that
111 line and made corner 2—or was it at the request of Mr. Lavagnino?

A. No; I had to do it. That is, I had to draw the line in, although I objected to it. Mr. Lavagnino didn't tell me to draw the line in.

Recess of court until 2 p. m.

2 O'CLOCK P. M.

J. FEWSON SMITH, JR., on the stand for further cross-examination.

By Mr. CRITCHLOW:

Q. At the point where you have marked upon the Yes You Do, lying right northerly of the place which you call your discovery, and which you said this morning was to represent the original location of the Levi P. State what kind of work was done at the time when you made this location on the 1st of January, 1898?

A. I couldn't state that there was any work done there.

Q. Did you do any work there?

A. Not there; below there.

Q. Is there any work there now?

A. Yes, sir.

Q. What?

A. A shaft of 4 or 5 feet deep.

Q. Mineral there at the shaft?

A. Yes sir.

Q. Is there a lode running through there?

A. Those works are done on the contact—not running the way you indicate.

Q. It is not running east and west?

A. Not at that particular point.

Q. It follows the ridge for some distance? Down here at this point you have marked discovery, is there a lode running along there?

A. It isn't a lode. It is the contact of the country.

Q. Are there two contacts—one at the place you call discovery here, and the other at the place you call the discovery of the Levi P.? 112

A. The contact is of considerable width there, that is in the porphyry, and those works are practically on the contact formation.

Q. You had heard of the existence of the Levi P.

A. Yes sir.

Q. And you knew where its corners were?

A. I knew from the description it was behind the No You Don't.

Q. Did you know where its discovery was?

A. Not until it was described.

Q. Did you find out where the discovery was at any time before you located the Yes You Do?

A. I was told by Mr. Mayberry that it was behind the permanent dump, which I could find in the dark.

Q You say there was evidence of work there?

A. No, the evidence of work was on a litle flat on top of the bluff. This shaft is on the slope some distance from that. I didn't see that shaft the night I made the location.

Q. Isn't it a fact that you intended to relocate the Levi P.?

A. Yes, sir; as nearly as I could.

Q. Of course, you went to the point where you supposed the discovery was and made your relocation there?

A. Close to it, I wasn't particular to 50 feet or 25 feet.

Q. Were you particular to find any evidences of mineral that night?

A. No sir.

Q. You didn't try for that?

A. No sir.

Q. You have some interest in this litigation, have you not?

A. I have no interest in the litigation—no, sir.

Q. You have no interest in the litigation?

A. I think I can say that. I have, and I have not.

Q. What do you mean by that?

A. When Mr. Lavagnino undertook to buy the claim, there was a possibility of having litigation, and we would have to, of course, stand the expense—somebody would have to stand the expense of the litigation, if there was any; and since I couldn't make a sale to Mr. Lavagnino out and out, I just let him take at his own terms, with the understanding that if the claim was given to him clear—that is, if there was no litigation from any source, and he got the claim through for patent clear, then I was to receive, in addition to what I got that day, a certain sum of money. 113

Q. When did you make this arrangement with Mr. Lavagnino?

A. I didn't keep track of that very closely. It was right after, I remember, some arrangement with Dr. Hasbrouck.

Q. State the fact when it was?

A. In 1898, between the time of entering the protest and the time of making the location.

Q. It was between January 1st and the time you entered the protest?

A. Oh yes; it would be somewhere about the middle of the summer, I should think.

Q. Along about June or July?

A. That I first spoke to him about it, and he didn't care to take any interest in it.

Q. Along about June or July, would you think?

A. It might be; it was summer time; it might have been.

Q. Did you receive anything from Mr. Lavagnino, at all?

A. Yes sir.

Q. How much did you receive?

A. One dollar in cash.

Q. That was simply to bind the bargain?

A. That was to bind the bargain.

Q. But the consideration, however, is to be received by you or not to be received by you, dependent upon the result of this litigation?

114 A. If he doesn't get the ground, we get nothing further.

Q. So that the interest which you have in the case is just exactly as though you were the owner of the ground, isn't it?

A. Well, we couldn't get a cent out of it now. I don't feel that I will get a cent out of it now, the way it has gone.

Q. You don't think you will?

A. I am afraid I won't. That will depend upon his liberality.

Q. You mean you don't think you will get any ground, and therefore you don't think you will get anything out of it?

A. No, sir; not by any means. When I transferred the ground to Mr. Lavagnino it was for the purpose of defeating these other claims, and not with a view of making much.

Q. Your idea was——

A. (Continuing:) of the amount we were to receive. Mr. Mayberry — that he knew of no location there that would inte-fere I felt that it would be no trespass, and I said, "If we don't get the ground and can't give you the ground, you can take out the expenses of the suit and we will get nothing."

Q. Did you have an agreement in writing with Mr. Lavagnino?

A. I think I submitted my terms. There was no agreement drawn up between us except a verbal agreement, but I made an offer to Mr. Lavagnino by letter, I think; in fact I am sure I did.

Q. Isn't there in existence a written contract between you and Mr. Lavagnino?

A. No sir.

Q. Or a written agreement of some kind setting forth the bargain between you?

A. No. There's this written transfer made by me to Mr. Lavagnino, but there is no agreement that is binding on each other.

115 Q. Did he accept it in writing?

A. No, he told me he didn't care to take any interest in the property when I made the written offer. He objected to having any interest in the property.

Q. You didn't want to go ahead and make this protest yourself, did you?

A. I didn't have any money to protest, and I couldn't.

Q. Isn't it a fact that you being a deputy United States mineral surveyor, couldn't make the survey and protest for your claim if you held it in your own name, and you consequently turned it over to Mr. Lavagnino?

A. It is a fact I couldn't make the protest in my own name while I held an interest in the claim.

Q. The interest that you now have in the claim is that you have received one dollar to bind the bargain, and the balance of the purchase price is to be received at the end of the litigation?

A. There is no agreement that will give me anything now.

Q. At the end of the litigation, if ever, you are to receive pay for the ground. Isn't that true?

A. If there had been no litigation I would have received a certain sum of money.

Q. No, no. If you are ever to get any payment at all, it must be at the end of the litigation. Isn't that true?

A. No sir; that isn't the way. It wouldn't be right to state it that way.

Q. Have you got a copy of that letter?

A. I believe Mr. Lavagnino has got the letter. He isn't here just now. Can I make a little statement.

Q. You can do that on re-direct. I want to ask particularly about this thing. Was your agreement with Lavagnino upon a basis of so much per acre for the ground, that you were to get out of it?

A. No sir.

116 Q. It was for the whole claim?

A. It was to sell him the claim without any litigation. If he had litigation then he could take care of himself, and we had nothing.

Q. Is that the way the letter reads?

A. No, sir; that is the spirit of the agreement.

Q. That is the spirit you have.

A. Well, it is the agreement unfortunately; that is, verbally.

Mr. CRITCHLOW: Have you the letter Mr. Lavagnino, written to you by Mr. Smith with reference to the offer he made?

Mr. LAVAGNINO: I haven't got it here. I will look for it this

evening. I made an attempt to find all the papers I have got, and except what I have got here I didn't find anything else.

(Mr. CRITCHLOW:)

Q. Did you actually receive one dollar?

A. I insisted upon Mr. Lavagnino giving me one dollar, for I had to go down next day, and I didn't have a dollar to pay fare out.

Q. Did you give it back to him?

A. No sir.

Q. In whose employ were you on the 1st of January, 1898?

A. I was in the employ of Allen G. Lamson.

Q. Do you know what Mr. Mayberry was at that time?

A. Yes sir.

Q. What was he?

A. Foreman for the Old Jordan and Galena Mining Company.

Q. Was he at that time with the United States Mining Company?

A. No sir.

Q. The Old Jordan and Galena. Were you also employed by the Old Jordan and Galena?

A. Yes sir; I was doing their surveying.

Q. You and Mr. Mayberry were very friendly?

A. Sometimes. Not so very friendly about that time.

117 Q. What interest has Mr. Mayberry in this claim?

A. No interest at all.

Q. When you located that ground did you jump the ground of Mayberry, or did you locate it for him in part or in whole?

A. Mr. Mayberry wasn't considered—no interest in any way; and I simply located on the ground; I didn't jump the ground. It was vacant.

Q. You still considered that Mayberry had an interest with you in the ground when it was sold to Lavagnino?

A. No sir.

Q. Hasn't he now the same interest that you have?

A. No sir.

Q. You promised to pay Mr. Mayberry something, if you get it out of this litigation?

A. No sir; only for his services.

Q. What services?

A. His services in coming here to testify. That is, I haven't promised to pay him anything. That is for Mr. Lavagnino.

Q. You speak of this as your claim and your litigation, don't you. You are interested in it?

A. Why in the sense that you mean, I am not interested in it.

Q. Have no interest whatever?

A. I have no interest in it, only to see the case won, that is all. I feel interested enough to see the case won.

Q. What did you mean a little while ago when you said you wanted to knock out or defeat these other locations?

A. Well, I had been dickering with them, and they deceived me

in regard to this $50 worth of work, and at the last moment when the work should have been done—it was promised to be done it wasn't done, and they promised to give me a bond and lease of the property, or at least, I promised to give them, and they were to do the $50 worth of work, and it went on to within a few days
118 of the time, and I got a suspicion that they wanted the ground to go by default and possibly locate it. So I sent out men to do the work; and then I went to Mr. Hasbrouck.

Q. What did you mean when you said you were interested, or that your interest was in having Lavagnino try to knock out these other locations?

A. I had no love for the other locations or their possessors.

Q. You mean the Uhlig 1 and 2?

A. Yes sir.

Q. You had been assured by Mr. Mayberry that there was no such locations as the Uhlig 1 and 2?

A. No, Mr. Mayberry said there were two locations back there that he was going to abandon.

Q. Didn't you say a moment ago that Mayberry told you that this ground was clear?

A. He told me, gave me to understand, that was a full claim in there, and he didn't think there were any claims in conflict with it.

Q. When you found out as a matter of fact, the Uhlig No. 1 and the Uhlig No. 2 are here in conflict with this, then your ambition is to knock them out in some way?

A. When I found out what I have told you, my ambition was to knock them out.

Q. You didn't intend to conflict with the Uhlig No. 1 and the Uhlig No. 2 when you located the Yes You Do, but you thought there was a full claim which might be located on vacant ground?

A. I thought those two claims—in fact, I didn't think about it. When I began to investigate I thought they were farther away.

Q. When you found that the Uhlig No. 1 and the Uhlig No. 2 were here, why did you deed all this conflict area to Lavagnino and tell him that you wanted to knock them out?

A. I didn't tell him that. The reason that I deeded him that ground in conflict was that I didn't believe that ground could
119 be held by them, or belonged to them.

Q. Did you think it was located after the Yes You Do?

A. No, sir.

Q. You knew it was located before that?

Judge STREET: I desire to object to it as not proper cross-examination, for the reason that this whole subject-matter now being examined into, if admissible at all in cross-examination, would be admissible to show some interest of the witness in the result of the controversy. It does not relate to the validity of the Yes You Do location, but pertains to a time subsequent to the location of that claim.

The COURT: I suppose he is trying to disclose his interest and his bias, if any.

Judge STREET: I think it has gone to the extreme, if that is the object.

(Mr. CRITCHLOW:)

Q. When you located this, did you intend or expect to cover ground belonging to the Uhlig No. 1 and the Uhlig No. 2?

A. No sir; I didn't expect that I was doing it.

Q. When you came to deed to Mr. Lavagnino, did you know that the Yes You Do covered the Uhlig No. 1 and the Uhlig No. 2 in part?

A. Yes sir.

Q. Why did you deed to Mr. Lavagnino that part of the Yes You Do location which covers the Uhlig No. 1 and the Uhlig No. 2, if you didn't intend to locate that ground?

A. Well, I can't hardly answer that. When I made my location I thought the location was clear. When it turned out that they claimed to be there, I still felt that I was entitled to the ground.

120 —. Why?

A. The location notices were a little mixed, and from the statements made to me by Mr. Mayberry.

Q. It was on account of Mayberry telling you that there was room for a full claim in there?

A. He told me he had a full claim in there, and he described to me some of the other posts and conditions which I considered in making the location.

Q. You found Mayberry was mistaken in saying that he had a full claim in there?

A. No, sir; I don't think I did.

Q. Did you attempt to mark the Levi P. claim on here?

A. Yes, sir.

Q. Did you find that he had room for a full location in there between the Uhlig No. 1 and the Uhlig No. 2 and the No You Don't?

A. If you force me to recognize those other surveys, I would say he had not room for the claim; but I didn't recognize them.

Q. You don't recognize them?

A. No, sir.

Q. How much in all were you to get for the Yes You Do location from Mr. Lavagnino?

Judge STREET: We object to that as immaterial and irrelevant.

Mr. CRITCHLOW: We desire to show his interest.

The COURT: They haven't offered the deed in evidence, and as the deed is not in evidence and before the court, I don't think at the present time the question is proper. The plaintiff withdrew the offer of the deed.

Judge STREET: We expect to offer it.

The COURT: I think it would be more proper when the deed is received in evidence, if at all.

Mr. CRITCHLOW: We think we have a right to press the question for the reason that the witness gave it merely as his conclu-
121 sion that he doesn't think there would be anything coming to him. We would like to have the basis upon which he draws this conclusion. It may be entirely erroneous as soon as the amount is stated.

The COURT: The court has stated that he would give you a wide range of cross-examination with a view of affecting or testing his prejudice or bias in relation to this matter—to test the credibility of his evidence. But this matter wasn't called out in chief. You may ask him however.

Exception by counsel for plaintiff.

(Mr. CRITCHLOW:)

Q. What was the full amount you were to receive at the end of the litigation?

A. The arrangement is to give Mr. Lavagnino the ground patented, he to pay all the expenses of patenting out of $600 and I was to get the difference.

Q. So that, if he could get any part of the ground of the Yes You Do location, no matter how much, and the expense of patenting it should not go to $600, you would get the overplus?

A. No, sir; not now.

Q. You said that was the bargain?

A. In this letter that was the bargain.

Q. Is that the arrangement between you?

A. It became evident that the property was going to be protested. Mr. Lavagnino made objections. I says, "Go ahead, and we will take the expenses out so far as that $600 goes. Those expenses will be taken out.

Q. So that the bargain remains just as it was?

A. No, sir; it stopped the sale then, and the agreement was then that he should go ahead and still take out such expenses, even if they ran up to $600.

Q. So, if I understand you correctly, the bargain between you was this—you deeded over to him the Yes You Do, and you received $1. For the rest of your consideration you were to receive such
122 an amount, $600, less the expense *pf* patenting and the expense of the litigation?

A. Well the patent was the first consideration. The litigation was a subsequent event, not expected.

Q. Well, I ask you——

A. (Interrupting.) Well, that is right.

Q. So that if the expense of the patent and the litigation should amount to only $400 you would get $200?

A. Yes sir.

Q. And even though you succeed in retaining only this little triangle where you put your discovery?

A. If the claim goes through to patent he might object to that.

Q. If the claim went through to patent, and you got this little white triangle where you placed your discovery, and the expense of patenting and litigation was only $400, you would get $200 from Mr. Lavagnino, wouldn't you?

A. I can't answer that. The thing is rather uncertain. I think we can hold Lavagnino to pay us the total difference. But we have done so much talking over this thing that I can't state what I said, and what we have agreed to and what we haven't.

Q. If the expense exceeds $600, is Mr. Lavagnino to deed it back to you?

A. No sir; not much.

Q. Or if you pay the expenses, he would deed it back to you?

A. No, sir; no such thought was ever spoken of.

Q. You spoke about his deeding it back to "us," and "we" having an arrangement. Who is "we" in this matter?

A. I very seldom speak personally in any matter.

Q. Who did "we" and "us" mean in this thing?

A. I associated myself with Mr. Lavagnino in this case.

123 Q. You said "we" made this arrangement, and Lavagnino wasn't to deed it back to you?

A. Well, I referred to Lavagnino every time. I never said mine. I very seldom refer to anything as mine.

Re-direct examination.

By Judge STREET:

Q. Had you been on the ground covered by the Yes You Do previous to the time you located it in January 1st, 1898?

A. Over a portion of it.

Q. Had you been along the contact that you speak of?

A. I have been very near to it, along the ridge.

Q. Had you seen this prominent bluff?

A. Yes sir; I think I had. That is, I passed along the ridge. I can't state that I noticed at any time any particular point on it, previous to making the location.

Q. After you located it did you examine it?

A. Yes sir.

Q. What is the nature of the contact?

A. There's a contact between quartzite and porphyry.

Q. Is that related to other contacts, in your opinion, in the neighborhood.

A. It is the contact which carries the Telegraph and Jordan veins. That is, we assume it to be that.

Judge STREET: We will now offer our notice of location.

Mr. CRITCHLOW: We object to this notice of location: First be-

cause it is incompetent, for the reason that it purports upon its face to be a relocation of a mining claim which, according to the testimony of the witness and the statement of the location certificate itself, was a mining claim which was in existence prior to the time of this location, presumably a valid and subsisting mining claim, and for that reason the ground wouldn't be subject to location.

124 Secondly, because the location certificate is not upon its face sufficiently definite to fix the locus of the ground with reference to any natural object or permanent monument, as required by the act of Congress. In the third place, because it is incompetent, as well as being immaterial and irrelevant, for the reason that by the testimony of the witness it appears that it was not located by a person who had the power, under the act of Congress, to locate mineral ground, it appearing from the testimony of the witness that he was at the time mentioned January 1st, 1898, a deputy United States mineral surveyor for Utah, and therefore incompetent to make locations. In the fourth place, we object to it in this particular action for the reason that it now appears that the witness, at the time when the protest map and plat were made and the survey made by the surveyor for the purpose of fixing the boundaries for the purpose of an adverse claim and protest, the witness, who made that survey and made that plat which was introduced in the land office, was himself a deputy United States mineral surveyor, interested in the action, as he himself has stated, namely, interested in the title to the claim.

Objections argued at length by respective counsel.

Judge STREET: I desire to offer in this connection the deed from J. Fewson Smith, Jr., to Mr. Lavagnino, the plaintiff in this case, stamped with a $1 United States revenue stamp.

Mr. CRITCHLOW: We object to it for the same reasons heretofore given, namely, that there has been no proof, and can be no proof of a valid location of the mining claim under the act of Congress, section 452, and therefore there is nothing whatever to act upon, a being null, it can't be made good by any subsequent act of

125 the party; and for the further——

Senator BROWN: Let us take a ruling on this first.

(Motion as made by Mr. Critchlow read to the court.)

Senator BROWN: We will repeat that objection. We make all the objections to the deed that we did to the certificate of location.

The COURT: They offer them now in one offer. I desire to give the plaintiff a fair opportunity to test this question. My impressions are against him.

Senator BROWN: I want to make the same objection, so as to keep the record straight—I want therefore to make the same objection, and if your honor will allow me, to put one objection a little different. I want to add this: That it appearing affirmatively that this location, when made, was made by a deputy mineral surveyor who was prohibited by law from making it, therefore the location itself was in violation of the law, and couldn't be made a basis of any-

thing to transfer, either the basis of a valid location in himself, or any basis to deed to anybody.

The COURT: The court will sustain the objection to the offer in evidence of the location certificate, that is to say, the certified copy of the location notice, and the deed in connection with it, upon the third ground specified, and the additional fifth ground, I think it would be called—the one made by Senator Brown—because under the law J. Fewson Smith, Jr., the locator of the claim, was prohibited from making the location of a lode mining claim, and therefore had not the qualifications to initiate any title by any act that he did with reference to locating the Yes You Do mining claim.

126 Judge STREET: I understand the objection is sustained, and the location certificate and the deed are excluded?

The COURT: Yes, on the grounds I have stated. I do not pass upon the other points.

Judge STREET: I desire, also, that the record show that the objection was sustained upon the construction of section 4452 of the Revised Statutes of the United States, together with the general mineral act of the United States, section 2319.

The COURT: The court, in the construction of these two sections, holds that section 452 qualifies the section 2319, to the extent that—as construed by the court—it would be prohibited as a matter of public policy, that is, the right of J. Fewson Smith to make this location.

Judge STREET: We wish the record at this time to show that the construction of a Federal statute was involved in the ruling of the court.

The COURT: The court desires to place the matter fairly upon that construction.

Judge STREET: Yes; that is what I understand.

The COURT: I do this with some reluctance. I would like to see the case tried. I believe, however, upon a full consideration and construction of these two statutes, the court is bound to hold the location notice invalid.

Judge STREET (to opposing counsel): Will you now admit the allegation of the complaint with respect to the filing of the protest and adverse claims by Mr. Lavagnino within the time prescribed by law?

Senator BROWN: We don't want to admit that. But we will do what will have the same effect for you. We will admit that
127 you offer to show it, and that we object to it, because in *its* connection with the proof it would be immaterial. That implies, for the purposes of review, that you have proven it.

Judge STREET: In order to get the record straight, we offer to show in this case at this time, first, that within the time prescribed by the Federal statute, the plaintiff filed in the United States land office a proper protest and adverse claim with respect to the area in conflict between the Uhlig No. 1 Lode mining claim and the Uhlig

No. 2 Lode mining claim and the Yes You Do mining claim, and that within thirty days of the time of filing the protest and adverse claim, the plaintiff commenced this action in this court to determine the right of possession of the area in conflict between the said claims. We also offer to show that at the time the Yes You Do Lode mining claim was located, or, I should say, at the time the Uhlig No. 1 and the Uhlig No. 2 mining claims were located, that there was a subsisting, valid location known as the Levi P. location, and also a further subsisting valid location known as the Veta location, as displayed on Exhibit No. 3, and that the Levi P. location covered all of the area in conflict between the Yes You Do and the Uhlig No. 1 and the Uhlig No. 2 claims, and that the necessary labor required by the United States statute for the Levi P. claim was performed up to and including the year 1896, and that in the year 1897, previous to the location of the Yes You Do, the owner of the Levi P. claim abandoned all rights to that claim, and also performed no annual labor or improvements upon that claim for the year 1897; and also that the Veta Lode mining claim was located in the same year as the Uhlig No. 1 and the Uhlig No. 2, and antecedent thereto, antecedent in point of time, to the Uhlig No. 1 and the Uhlig No. 2, and covered the discoveries
128 of each of said claims, the Uhlig No. 1 and the Uhlig No. 2.

We also offer to show that we have performed the annual labor and improvements required by law upon the Yes You Do mining claim for the years 1899 and 1900—that Mr. Lavagnino, the plaintiff, has performed the annual labor. And we also offer to prove that at the time, and for some time antecedent to the time that the protest and adverse claim were filed by the plaintiff in this action in the United States land office, that the title had passed from J. Fewson Smith, Jr., to the Yes You Do, to G. Lavagnino, the plaintiff in this action. We also wish to prove that the certified copy of the location notice offered was recorded January 3rd, 1898, at 10:21 a. m. at the request of J. Fewson Smith, Jr., in the office of J. C. Jensen, county recorder of Salt Lake county, and is recorded in or described in Book G of Mining Abstracts, page 191, and that the plaintiff and his grantor have, during the time since the location of this claim complied with all the laws, rules and regulations of the United States and of the State of Utah, and of the West Mountain mining district, to entitle them to the possession of the Yes You Do Lode mining claim, including the conflict area between the Uhlig No. 1 and the Uhlig No. 2 claims.

Senator BROWN: To all of these various offers we have various objections. To the evidence of the record of the notice of location, we say that it is immaterial, because the record itself being void its recording would be immaterial. To the offer to prove that the work was done upon this claim, the Yes You Do, we object that it is immaterial, because the location not having been a legal one, it is immaterial whether he did any work or not. To the offer to show

the filing of the adverse claim within the sixty days' period of
129 publication, and the commencing of the suit within thirty days thereafter, I object that that is immaterial for the same reason; it would be material in a valid location only. In other words, all that falls within the ruling that has already been made. There was another offer which, it strikes me, stands upon an entirely different plane—nothing to do with it. Still, I make these objections to these things, and I think I have covered now all connected with the plaintiff's case. If not, I object to the other things. There was an offer to prove something about the existence of two mining claims known as the Levi P. and the Veta, and perhaps another one—those two, at any rate. As to those claims, it rests on an entirely different foundation. We understand that it is our duty to go on and prove title to the Uhligs now, or at least after the plaintiff shall have rested. If these gentlemen desire in advance, without waiting, to rebut or attempt to prove that the Uhligs must necessarily have been illegal claims, the Uhligs and the Mute, I think we will not object. It wouldn't be any part of their claim, and I only object to it as no part of theirs. But if they see fit to begin to rebut the possibility of the legality of ours, we don't care; we are willing they should do it.

The COURT: That might bring the whole case up for determination by the supreme court. Of course, there would be some advantage in that way, in having the case fully determined on the evidence.

Senator BROWN: I take it they couldn't make it any stronger than their offer. They go up with it just as they have proven it. It is simply as to the Veta and the other fellow.

130 The COURT: Of course, the court will permit the question to be litigated, if it is desirable, in order to have the facts go up before the supreme court of the State. It is a very important question, and one not altogether free from doubt. I am trying to get at it the best I know how; and if all the facts are gone into in the case, then the supreme court, in passing upon the facts, if they are there, can make some direction to the court below if they should overrule the position I have taken. It might avoid a retrial of the action. Of course, if they sustain the position I have taken, that would end it, so far as the title to the Yes You Do is concerned.

Judge STREET: I will segregate my offer, and offer all the other matter except the matter relating to the Levi P. and the Veta first.

Senator BROWN: To that I object, to the whole of it. It is immaterial. The foundation having fallen, and there being no location at all, they must go with it; and for the same reasons contained in the objections already made to their location.

The COURT: As to the proceedings in the land office, in so far as the claim of the plaintiff to the Yes You Do is concerned, the court having held that the location was void, having held that the locator, J. Fewson Smith, was not authorized, but prohibited by *by* the law for making the location, and that the filing of the adverse claim

by him in the land office would be invalid, the objection to that offer will be sustained.

Exception by counsel for plaintiff.

Judge STREET: I was just going to say that, in view of some doubt among the profession as to the standing and rights of the
131 attorneys for a plaintiff whose location is decided to *to* be void, I am somewhat at a loss whether to simply *to* rely upon presenting to the court, as if we were still interested in this litigation as perhaps friends of the United States Government, the matter respecting the Levi P. and the Veta, or whether to offer now the subject matter respecting the Levi P. and the Veta which I have heretofore outlined to the court; and in view of the uncertainty with respect to the position of counsel in this case, the plaintiff having been found to have no standing before this court at all, and the situation having been presented to the court, upon which the court finds that he never had any status, I think that I will repeat my offer, with your honor's permission.

Senator BROWN: We will let you go on if you want to prove the Levi P. We may raise objections as it goes along. But to the general offer, that you are going to prove the Levi P. to be a good location, we have no objection.

The COURT: What have you gentlemen to say as to whether in proceeding upon this point, the burden is shifted to the defendant, the application for patent, as to the Uhlig claims.

Senator BROWN: I have already stated that I thought the proper way was for us to take the burden.

Judge STREET: The question I raise is whether we have any standing or not?

The COURT: The court feels inclined to give you the right to rebut it, or take the initiative.

Judge STREET: I would like to raise this question fairly, and I am trying to devise a way.

We will rest.

132 LAYFAYETTE G. BURTON, sworn for the defense.

Judge STREET: I wish to withdraw my rest to make one further offer, which I understand to be the fact, that is, to prove that the entire interest of Mr. McKernan, as well as Edmund H. Uhlig, both of the original defendants in the case at bar, has passed to the St. Joe Mining Company, which has appeared in this case and been made a party here.

Senator BROWN: Go ahead and prove it.

(Certified copy of location certificate and deed heretofore offered in evidence and excluded by the court, marked for identification by the reporter with the initials "J. W. P.—Z and Y" respectively.)

Dr. R. HASBROUCK, sworn for the plaintiff.

Examined by Judge STREET:

Q. What position do you occupy with respect to the St. Joe Mining Company?

A. President.

Q. Are you familiar with the transactions of the company with Edmund H. Uhlig and Alexander McKernan?

A. Yes sir.

Q. Has the interest of Mr. Uhlig been transferred to the St. Joe Mining Company?

A. Yes sir.

Q. Has the interest of the other one, Alexander McKernan, in the Uhlig No. 1 and No. 2 claims been transferred to the St. Joe Mining Company?

A. No.

Q. Has the St. Joe Mining Company paid the purchase price for that interest?

Objected to as incompetent.

Judge STREET: We desire to show that the actual title has
133 been made to the St. Joe Mining Company, and that it is the actual party in interest here.

The COURT: I don't know what the objection is just yet.

Senator BROWN: We object to it as immaterial in this action of title to determine whether any consideration was paid by this company, the St. Joe Mining Company, to one of the locators, McKernan. It is entirely immaterial in this action. If it were an action in equity for specific performance by this company against McKernan, that would be different; but in this action it is entirely immaterial.

Judge STREET: It relates to a technical point made by Mr. Critchlow in the inception of the case, that is, that this action had been dismissed as to Mr. McKernan. The St. Joe Company has appeared in this case, and when once they appear that appear for all purposes, and we wish to show that they are an equitable owner; that Mr. McKernan is dead; that they paid the entire purchase price and are entitled to a deed, and that their appearing in this action would reinstate them for all purposes, if there is anything in Mr. Critchlow's point.

The COURT: I understand that this suit was commenced against Uhlig and McKernan.

Judge STREET: Through an alleged defect in the summons Judge Hiles dismissed it as to McKernan.

The COURT: Because more than three months had elapsed since the suit was commenced and no summons had been issued?

Mr. SONNEDECKER: Because the summons was not returned by the sheriff in time.

Mr. CASEY: I think the summons was attempted to be served
134 on Mr. McKernan, but it didn't contain the name of Mr. McKernan at all, and the court held that no service whatever was made upon Mr. McKernan and the summons was quashed. The order reads that the summons was quashed and the complaint dismissed entirely as to Mr. McKernan. There has been no appearance since as to Mr. McKernan.

The COURT: Is the St. Joe Mining Company substituted for either one of these parties defendant?

Mr. CASEY: Only as to Mr. Uhlig.

Judge STREET: My point is, when they are shown to be the owners, their substitution brings them in for all purposes to the extent of their interests.

The COURT: He may answer the question. I will overrule the objection.

Exception by counsel for defense

(Question last propounded read to witness.)

A. No, sir.

Q. Has the St. Joe Mining Company a contract with respect to the McKernan interest?

A. A deed in escrow.

Q. Have they made payment upon it?

A. There was—for one-eighth we have the receipt of the administrator—for a one-eighth of the one-third that Mr. McKernan held in the property.

Q. Have you a contract with respect to the remainder of the McKernan interest?

A. The deed in escrow is the only contract.

Q. Have you made all the payments that the escrow agreement calls for?

Objected to as immaterial, and for the reasons already stated.

Objection overruled.

Exception by counsel for the defense.

135 A. I stated that we had paid one-eighth of the one-third interest that McKernan held in the property that we got from them.

Q. One-eighth of the purchase price for the one-third?

A. We have paid one-eighth of one-third of the price that was to be paid.

Q. Have you the escrow agreement or a copy of it?

A. That is in the bank.

Q. Have you a copy of it?

A. No sir.

Q. Can you produce to-morrow morning a copy of it, which you can identify as a correct copy of it; or will you tell me what bank it is in, so as to authorize us to subpoena the bank to bring in the agreement?

A. It could be done.
Q. What bank is it in?
A. In the National Bank of the Republic, I believe.
Q. Couldn't you furnish a copy that your counsel would admit was the agreement?
A. I can, if it is desirable.

Senator BROWN: If we can get one, we will get one for you; if we can't, we'll tell you so.
Judge STREET: Then, with the proviso that if the agreement amounts to a sale of this property, a vendor and vendee contract, instead of a mere option, we desire to introduce it, and as of the time before resting, I think we will rest now.
The COURT: Your rest may be considered withdrawn for that purpose.

(Plaintiff rests.)

136 LA FAYETTE G. BURTON, heretofore sworn, called for the defendants.

Examination by Mr. CRITCHLOW:

Q. Your name is L. G. Burton?
A. Yes sir.
Q. You are a deputy United States mineral surveyor?
A. Yes sir.
Q. And you have been for many years?
A. I have.
Q. Did you survey the Uhlig No. 1 and Uhlig No. 2 mining claims lode mining claims, in the West Mountain mining district?
A. Yes sir.
Q. Have you prepared a map showing your survey of those two claims?
A. Yes.
Q. And showing, also, the relation between those claims and certain adjoining claims known as the Spring and the St. Joe No. 1 Lode mining claim?
A. Yes sir.
Q. Also showing their topographical features?
A. Yes sir.
Q. Explain what the topographical features are that you have on your map there. Or do they explain themselves?
A. They explain themselves.
Q. I notice, also, something that seems to indicate work upon these claims. Were those from actual surveys made by you?
A. Yes sir.
Q. Indicating tunnels from the surface of the ground?
A. Yes sir.

Q. Calling your attention first to the Uhlig No. 1 Lode mining claim—that is patent survey No. 3683?

A. Yes sir.

Q. At what date did you make that survey?

A. I commenced the survey May 12, 1898.

Q. I note that you marked upon the map corners 1, 2, 3, and 4. Did you at the time you surveyed the claims for patent at the date mentioned, May 1898, find location corner stakes?

A. Yes sir.

137 Q. Won't you explain where you found the corner stakes of the Uhlig No. 1 location at the time you made this survey, and state whether or not they are indicated upon the map?

A. Corner No. 1 is identical with the northeast location corner of the claim.

Q. What did you find at that corner?

A. A 2 x 4 post marked in pencil. This is a mound of stones at this point.

Q. Proceed to the location of stake No. 2?

A. I don't remember what I found there. I don't remember the description of the corner, but it is marked location corner in my notes.

Q. Are you able to state whether there was a mark on that corner of some sort or other?

A. My memory is that there was, but I can't tell positively, because I haven't a note of it. I have simply got "location corner."

Q. That location corner was of what location?

A. Of the Uhlig No. 1.

Q. Proceed to corner No. 3 You established a corner there in your patent survey?

A. Yes sir.

Q. How did that correspond with the location corner?

A. Identical, and was an oak stake, two inches in diameter.

Q. Proceed to patent corner No. 4. Did you find the location corner for that?

A. The location corner was south 72 degrees 46 minutes west, 119.5/10 feet from where I placed the patent corner.

Q. So you had to draw in the patent line?

A. Yes sir; that was a stake in a mound of stones.

Q. Marked how?

A. Marked location corner of the Uhlig No. 1.

138 Q. Did you also at that time find a discovery point or monument within the boundaries of the Uhlig No. 1?

A. Yes sir.

Q. Where did you find that?

A. At the north end of an open cut. That was a post in a mound of stones.

Q. How was it marked?

A. It was marked "Discovery of Uhlig No. 1" I don't remember whether the notice was there or not.

Q. Did you take a bearing and the distance from any corner of the Spring patented claim, No. 337?

A. Yes, sir.

Q. Won't you give me that bearing, either by measurement or scale, as near as you can?

A. Well, I made a direct measurement from that post through to the corner of the Spring.

Q. I don't care about the exact measurement. Give me the measurement as nearly as you can state it upon that map of the distance between the discover- of the Uhlig No. 1 and the northwest corner, being corner No. 3 of the Spring?

A. Southeast of it 580 feet.

Q. Did you put the Spring lode upon this map from actual measurement, or by calculations.

A. From actual measurements, taken from post 2 of the Uhlig No. 1 and post 3 of the Spring.

Q. Do you know the hill situate in the West Mountain mining district known as the Telegraph hill?

A. Yes sir.

Q. State whether this Uhlig No. 1 is on the side or slope of that hill?

A. The west end of the Uhlig No. 1 comes on to the ridge and about 100 feet past the ridge, between the Telegraph mine and the Saints' Rest gulch.

130 Q. Assuming that this is a part of Telegraph hill, on what slope would it be?

A. It would be the westerly slope—slope to the west from here (indicating)

Q. But the main body of the Uhlig No. 1, which slope would that be on?

A. It would be on the east slope, sloping from the ridge to the east.

Q. Was the crest of the ridge along here, or is it up here (indicating same to witness)

A. Here is the crest of the ridge along here (indicating same)

Q. As it runs through the No You Don't claim, which way does the crest of the ridge run?

A. It runs northeasterly and southwesterly.

Q. So the slope would be to the southeasterly?

A. Yes, sir.

Q. As defined from the northwesterly slope?

A. Yes, sir.

Q. Won't you give me by scale the distance from the discovery point to the easterly or southeasterly end line of the Uhlig No. 1.

A. It is 51.8/10ths feet.

Q. And to the westerly end line?

A. About 1100 feet.

Q. I see you have a mark here, "Saint's Rest gulch." Can you tell me about where the crest of the ridge would be, or the crest of

the hill would be, to the easterly of Saint's Rest gulch coming over into the next gulch, which I understand to be Revere gulch?

A. The crest would pass through post No. 4 of the Uhlig No. 2, about through the middle of this arrow, and coming down past or near post No. 2 of the St. Joe lode.

Q. So, in which gulch, Saint's Rest gulch or Revere gulch would this discovery stake be?

A. It is in Saint's Rest gulch.

140 Q. Am I correct in saying that the next gulch east is Revere gulch?

A. I think that is what it is called.

Court adjourned until 10 o'clock, Tuesday morning, March 26.

TUESDAY, *March* 26, 1901—10 a. m.

LA FAYETTE G. BURTON, on the stand for further direct examination.

By Mr. CRITCHLOW:

Q. I will ask you whether at the time you made the survey of the Uhlig No. 1 you had with you a copy of the location notice of that claim?

A. Yes, sir; I had such a copy.

Q. Furnished you, I suppose, by the surveyor general's office?

A. Yes sir.

Q. Would you recognize the copy of the location notice?

A. Well, I wouldn't say for sure. It is a long while ago. That (referring to copy shown witness by counsel) is not the copy I used.

Q. It isn't the very copy you used?

A. No.

Q. But whether it was a copy similar to this you are unable to say at this time?

A. I am unable to say—yes.

Q. I direct your attention to the Uhlig No. 2 Lode mining claim, No. 3684. I understand you to say that you made the patent survey for that?

A. Yes, sir; I did.

Q. Which you have put upon the map?

A. Yes sir.

Q. In making that survey, did you find the location corners of the claim?

A. Yes sir.

Q. Won't you state when you made that survey?

A. The survey was commenced on May 12th, 1898.

Q. Commencing now at post No. 1 of the patent survey as you have it located on the map, I ask you whether you found a location stake on that claim that purported to be a corner stake of that claim?

A. Yes sir; the location stake of that corner was north 14 degrees 28 minutes east and 7.2/10th feet from that post of the Uhlig No. 2. The location corner was north 14 degrees and 28 minutes east 7.2/10th feet.

Q. How was it marked?

A. I think it was marked in pencil, but I am not positive.

Q. It was marked, was it?

A. Yes sir.

Q. Directing your attention to post No. 2 of the patent survey, I will ask you whether you found a location corner stake or monument in that vicinity?

A. Yes, sir; there was a small post, marked, and situated north 63 degrees 28 minutes east 34-8/10ths feet from post No. 2 of the Uhlig No. 2.

Q. And it — marked upon the map "L."?

A. Yes, sir; location corner.

Q. That you found, also, marked Uhlig No. 2?

A. Yes, sir.

Q. Directing your attention to corner No. 3. Did you find the location corner for that corner of the Uhlig No. 3?

A. I have it marked in my book location corner, but I don't know how that was marked, or whether it was a post or a mound of stones.

Q. You did find a corner there?

A. Yes, sir; I found some kind of a corner there, because I made a note of it.

Q. I direct your attention to location corner No. 4.

A. That was a 2 x 4 post, marked northwest corner stake of Uhlig.

Q. Did it say Uhlig 1 or 2.

A. It was just Uhlig. The other may have been rubbed off. That is all that was on it at the time, "Northwest corner Uhlig."

Q. At that time, what, if any thing, did you find at the
142 point which you have marked upon the map "Discovery"?

The COURT: Is the Uhlig No. 2 involved in this action?

Judge STREET: Yes, sir; a small conflict.

Mr. CRITCHLOW: Yes, sir—this green through here (indicating.)

The COURT: I understand there are two actions between the same parties?

Mr. CRITCHLOW: The other is with reference to the Mute claim.

Judge STREET: The application is for both 1 and 2. That is why the two areas in conflict are involved in this case.

A. On the Uhlig No. 2 I found a post there, and I think the location notice was posted at the post, although I am not positive.

Q. Do you remember whether the post was marked?

A. My impression is that it was, but I am not positive as to how.

Q. Was that identified to you by any person?

A. Yes, sir; by Mr. Gary, the foreman of the mine.

Q. I see you have marked there "Open cut," 4 x 10 x 8?

A. There is an open cut made at the discovery point—yes, sir.

Q. Did you have at that time when you made this patent survey in May, 1898, with you a copy of what purported to be the location notice of the Uhlig No. 2?

A. Yes, sir; furnished by the surveyor general.

Q. Can you determine whether that copy which you hold in your hand is a copy similar to the one you had or not, at this distant time?

A. Well, I think it is similar, but I don't remember now. It is a long while ago.

Q. You have marked on this Spring lode a point as "Discovery" "Spring discovery." How do you determine that point?

143 A. That was taken from the notes in the surveyor general's office. I located post No. 3 of the Spring.

Q. But the Spring discovery—did you survey that, or only locate it from notes in the surveyor general's office?

A. That was from notes in the surveyor general's office.

Q. Do you know otherwise than from the notes anything about whether that is the Spring discovery?

A. No, sir; I do not.

Q. I suppose these distances are correctly marked eastward from the discovery?

A. Yes sir.

Q. On the Uhlig No. 2—to the end lines; 478.5/10 feet easterly to the end line, and 959.3/10ths feet westerly?

A. Yes sir.

Q. I understand you to say that the ridge between Saint's Rest gulch and Revere gulch runs through the No You Don't, the Mute and the Uhlig claims, and through the Spring claim?

A. Yes. Post No. 4 of the Uhlig No. 2 is very close to the summit, and the middle of the meridian, the arrow on the map, is close to the summit also.

Q. So it runs down there in a general northwesterly direction?

A. To about post 2 of the St. Joe.

Q. In a general northwesterly and southeasterly direction?

A. Yes; that would be the course.

Q. The ridge again—the summit would be here by post 2?

A. Yes sir.

Q. Revere gulch, then, would be over to the easterly of the discovery of the Uhlig No. 2?

A. Revere gulch passes northeast and southwest near post 1 of the Uhlig No. 2.

Q. That would be the bottom of the gulch?

A. Yes. It is marked there in pencil.

Q. So that the ridge between Revere gulch, which passes at about post 1 of the Uhlig claim, and Saint's Rest gulch, which —

144 marked upon this map, would pass through the Uhlig No. 2 claim?

A. Yes sir.

Q. And state whether or not this discovery of the Uhlig No. 2 claim as you have marked it there, would be upon that ridge?

A. It is on the easterly slope of the ridge.

Mr. CRITCHLOW: I offer gentlemen, the location notices of the Uhlig No. 1 and the Uhlig No. 2 Lode mining claims—certified copies of each. They may be marked for identification.

(Marked for identification "B and C—J. W. P.," respectively.)

Mr. CRITCHLOW: I will withdraw that offer for a moment.

(Mr. CRITCHLOW:)

Q. Did you in your patent survey make a sufficient examination of the Uhlig No. 2 claim, either above or under ground, to discover or find mineral in place anywhere upon the claim?

A. Well, I found rock that looked like mineral, but I didn't have any assay made.

Q. You are familiar with the appearance of mineral-bearing rock in that district, are you?

A. Yes sir.

Q. Either at the discovery or in the tunnel did you find any?

A. In the tunnel I found iron stained quartz.

Q. Quartz bearing iron, according to the looks of it?

A. Yes sir.

Q. Did you find any rock bearing other mineral lead or copper?

A. In the St. Joe tunnel I found a little rock bearing lead.

Q. What experience have you had in the matter of examining veins of mineral-bearing quartz or rock?

A. I have been surveying lode claims for the last 15 or 16 years.

145 Q. And surveying in mineral claims—working in them as well?

A. Yes sir.

Q. In veins in the mines?

A. Yes, sir.

Q. Did you discover in there any vein or quartz or other rock which usually bears mineral in that district?

A. Yes, sir; and it was also copper stained.

Q. The copper showed an evident stain? So that the appearance of it could be detected by the eye?

A. Yes sir.

Q. Where did you find the vein in the Uhlig No. 2? Can you determine by the map?

A. Well, I think the best showing was near station 4, and also near station 16.

Q. On this map which you have prepared?

A. Yes, sir.

Q. Near stations 4 and 16?

A. That is the way I have it.

Q. And what did you find there in the way of evidence of a vein?

A. Well, it was rock stained with iron stains and copper stains.

Q. What kind of rock—quartz, quartzite or porphyry?

A. I took it to be quartz.

Q. I will ask you about the showing at the discovery of Uhlig No. 1. Won't you state again what you found there in the way of evidence of mineral-bearing rock in place?

A. I don't remember much about the discovery except the size; that is, the cut of the discovery. But I remember at the shaft there was what looked to be mineral.

Q. What was the evidence of it?

A. That was an iron stained quartz.

Q. And the iron and the quartz were plainly visible to the eye?

A. Yes sir.

Q. Did you find any copper stained quartz as well?

A. I don't remember any copper stains.

146 Mr. CRITCHLOW: We offer first the map prepared and testified to by the witness, as Exhibit A.

Judge STREET: As attorneys for the plaintiff we have no objection.

(Map marked "Def't's Ex. A—J. W. P.")

Mr. CRITCHLOW: We offer in evidence the location certificate or notice, certified by the county recorder of Salt Lake county of the Uhlig No. 1 Lode mining claim to be marked Exhibit B.

Judge STREET: As attorneys for the plaintiff we desire to cross-examine the witness on the subject matter of his testimony.

Mr. CRITCHLOW: Then I will make the offer of both, in as [illegible] ch as they are together. We offer then, gentlemen, the certified copy of the location notice of the Uhlig No. 2, to be marked Defendants' Exhibit C.

Judge STREET: I offer in the first instance to cross-examine the witness solely as attorney for the plaintiff in this case.

Senator BROWN: Our objection has already been interposed.

The COURT: What is it.

Senator BROWN: Personally, we don't care to make any objections, but in view of your honor's statement we interpose the objection.

The COURT: The objection is overruled.

Senator BROWN: We will take an exception.

Cross-examination.

(Judge STREET:)

Q. Mr. Burton, with respect to the Uhlig No. 2 lode, I will ask you whether or not the ridge is outlined on Plaintiff's Exhibit No. 2—is correctly outlined as it passes through the Uhlig No. 2?

147 A. I think it is very close to what it should be.

Q. And on the map, Plaintiff's Exhibit No. 3, is the ridge correctly outlined?

A. I think it is about right.

Q. Passing down through the Uhlig No. 2, and down into the Spring lode?

A. I think so. It is very close to being right.

Q. Will you now point out on Plaintiff's Exhibit 3 where the point on the ridge between Revere and Saint's Rest Gulches about 700 feet westerly from the discovery stake of the Spring Lode patent, will be found?

A. Did you say from the Spring Lode patent?

Q. From the discovery stake of the Spring Lode patent?

A. A point 700 feet westerly?

Q. On the ridge?

A. 700 feet westerly and on the ridge would be a point about here (indicating same on map).

Q. That is a point which on Plaintiff's Exhibit 2 is directly beneath the letters "hl" in the words "Uhlig No. 2," is it?

A. Yes; it would be south of the letters "hl."

The COURT: You had better mark it on the map with some character.

(Judge STREET:)

Q. Mark that point which you have indicated and state to the reporter and court how you mark it, the marking being made on Plaintiff's Exhibit No. 3. You might mark your initials there. You have marked this point with an X and with the letters "L. G. B."

A. Yes sir.

Q. And the X represents the point where such a discovery would carry the point—that point you have described as situated on the ridge between Revere and Saint's Rest gulches about 700 feet westerly from the discovery stake of the Spring Lode patent?

148 A. Yes sir.

Q. You say you used a copy of the Uhlig No. 2 location notice when you surveyed the Uhlig No. 2 for patent?

A. Yes sir.

Q. And a similar copy to the one that is presented here?

A. Yes; I think it is similar.

Q. Did you make search for the discovery of the Uhlig No. 2 at the point that you have marked "X—L. G. B."?

A. No sir.

Q. That is where, under the description in the location notice, the discovery ought to be found, isn't it?

A. Yes, but we are supposed to be guided by the posts.

Mr. CRITCHLOW: We object to that as incompetent and a conclusion of the witness. That is for the court to say. That is a

mixed question of law and fact, which might be a question for the court to determine.

Objection overruled.

Exception by counsel for defense.

(Judge STREET:)

Q. How far from the discovery as marked on your patent survey, and this point marked "X—L. G. B."—how far are those two points separated, and in what direction?

A. The "X" is 500 feet southwesterly from the point marked discovery of Uhlig No. 2.

Q. And where would a distance 1000 feet in a southwesterly direction from the point marked "X—L. G. B." carry the end line of the Uhlig No. 2 claim?

A. It would carry it to a point about where the dash is between "1" and "survey" 3683.

Q. On the Uhlig No. 1 claim?

A. Yes sir.

Q. How far would a distance 500 feet in a northeasterly direction carry it?

A. It would carry it to a point marked discovery of the Uhlig No. 2.

149 Q. Do you personally know anything about the original staking of the Uhlig No. 2 lode?

A. No sir.

Q. Do you know anything whether the stakes you found there were the stakes as originally placed on the Uhlig No. 2 lode?

A. No sir.

Q. Do you personally know whether the discovery you place on the map was the discovery of the Uhlig No. 2 lode?

A. It was shown to me.

Q. I ask you whether you personally know it?

A. No, sir; I do not.

Q. You do not?

A. No sir.

Judge STREET: We desire at this time to object to the admission of the location notice of the Uhlig No. 2 lode upon the ground that the evidence does not in any — establish that the stakes found near the discovery pointed out to deputy mineral surveyer are the original discovery stakes as placed on the ground of that lode, Uhlig No. 2. Secondly, upon the ground that it appears from the evidence of the witness and the description of the location notice itself that the Uhlig No. 2 discovery has been shifted easterly about 500 feet, and that it doesn't correspond in any respect to the calls and references in the location notice and the permanent monument, being a ridge between Revere and Saint's Rest gulches mentioned in the location notice.

Senator BROWN: Do you expect to go further, with the Uhlig No. 1?

Judge STREET: Yes, sir.

Mr. CRITCHLOW: We would like to examine further before we submit the objection.

The COURT: Is your objection withdrawn temporarily?

Mr. CRITCHLOW: We suggest that he make objection to both at the same time.

150 (Judge STREET:) I can submit the same objection later on.

(Judge STREET:)

Q. I will ask you to mark a point 300 feet northerly from the northwest corner stake of the Spring Lode patent on the map—mark it on Plaintiff's Exhibit No. 3. You have marked that N. with a circle, and an X inside the circle, have you?

A. Yes sir.

Q. I will ask you to mark the same distance in the direction of the point marked discovery of the Uhlig No. 1, from the same stake?

A. Which way?

Q. 300 feet in the direction of the point marked discovery of the Uhlig No. 1, from the same corner. How have you marked this point?

A. With an X and an M.

Q. What distance is the point marked with an X and an M from the point marked discovery of the Uhlig No. 1 survey?

A. 235 feet southeasterly.

Q. You may state whether or not the point marked "XM" and the point marked "XN" are not both on the south side of Telegraph hill in Saint's Rest gulch?

A. Yes; they are both south of Telegraph hill, over here. They are south of it. But here is the ravine down here. A point down here would be more south—coming down here—(indicating same on map). These points are on the hill dividing Saint's Rest gulch from the Revere gulch.

Q. And the point marked discovery is in practically the same situation?

A. Yes sir.

Q. They are all three in the same boat?

A. Yes sir.

Q. You don't know anything about the original staking of the Uhlig No. 1 lode?

151 A. No sir.

Q. And know nothing about the original discovery, of your own knowledge?

A. No sir.

Q. The entire data you get is from what you found on the ground—in what year?

A. May 12th, when I commenced the survey, 1898.

Q. And what was told you about it?

A. Yes sir.

Re-direct examination.

By Mr. CRITCHLOW:

Q. You have told us that this Saint's Rest gulch, bottom of the gulch, is indicated by this line on the map?

A. Yes sir.

Q. And the discovery is just above the bottom of the gulch?

A. Yes sir.

Q. Of the Uhlig No. 1?

A. Yes sir.

Q. It isn't in the bottom of the gulch?

A. No sir.

Q. But it is in the gulch?

A. Yes, sir; it's in the gulch. The water from here drops into the gulch. It is on that slope.

Q. The Uhlig No. 1 claim, then, is described in the location notice as running 1400 feet in a southwesterly direction. The direction of the claim, as you have marked it on this line, is south 72 degrees 46 minutes west?

A. Yes sir.

Q. That would be southerly and westerly?

A. Yes sir.

Q. It wouldn't be south, and it wouldn't be westerly?

A. It would be southwesterly.

Q. And the direction—length of it there—is?

152 A. Shown on the map about 1085 feet.

Q. And it was located to run 1400 feet, but you have it within the 1400, being 1085 feet?

A. Yes sir.

Q. And northeast 100 feet, you have a course marked there—north 67 degrees and 25 minutes east?

A. 51.8/10ths feet.

Q. That would be in a general northeasterly direction?

A. Yes sir.

Q. And would be within 100 feet. The location notice calls for a stake situated on the south side of Telegrap- hill. That is on the southerly slope of Telegraph hill?

A. Yes sir.

Q. And about 300 feet northerly from the northwest corner stake of the Spring Lode patent, the place you have marked at Mr. Street's direction here. You have not marked about 500 feet, have you?

A. I marked them 300.

Q. Not about 300, but exactly 300?

A. Exactly 300

Q. As to how much ground a man would walk over and call it about 300 feet, you have no means of knowing or scaling upon a map, I suppose?

A. No, sir.

Q. It is precisely from the discovery point to post No. 3 how many feet, according to your scale?

A. 580 feet.

Q. Taking up the Uhlig No. 2: The location notice calls for a claim beginning at a stake and monument and bearing 500 feet in a northeasterly direction. What is the course of the line along the middle of the claim which runs easterly from the discovery of the Uhlig No. 2?

A. North 50 degrees and 38 minutes.

Q. That would be within five degrees of an exact northeast direction?

A. Yes, sir—and 38 minutes.

Q. Within six degrees of an exact northeast direction?

A. Yes sir.

153 Q. What would that be?

A. It would be northeasterly.

Q. The distance is 478 feet, as you have it upon the map, which, of course, is within the 500 feet, as called for in the location notice?

A. Yes, sir.

Q. The notice calls for 1,000 feet in a southwesterly direction. That runs south 50 degrees 38 minutes west?

A. Yes sir.

Q. And is 959 feet—inside of the 1,000 feet?

A. Yes sir.

Q. The location notice further says that the discovery stake is situated on the ridge between Revere and Saint's Rest gulches. Where did you mark on Exhibit No. 3 of the plaintiff in this case—did you mark a point at Mr. Street's suggestion on the ridge or on the summit of the ridge?

A. On the summit of the ridge.

Q. You didn't mark it on the ridge; but on the summit?

A. Yes sir.

Q. This is the crest of the ridge (indicating on map).

A. Yes sir; that is the crest of the ridge.

Q. Is the ridge a sharp or flat ridge?

A. No, sir; it is very flat.

Q. What would you say about the slope. Is it a continuous slope?

A. A gentle, continuous slope. As it gets down near the ravine, beyond the discovery, the slope is much more abrupt.

Q. According to your measurement there upon Exhibit No. 3, you have measured it as if the ridge were an air line along there, instead of being a flat expanse?

A. Yes sir.

Q. And the ridge slopes very gently, I understand, until you get east of the discovery?

A. Yes sir.

Q. The — goes precipitously down in the Revere gulch?

A. Yes sir.

154 Q. The location notice also calls for a discovery stake at the Uhlig No. 2 as situated 700 feet westerly from the discovery stake of the Spring Lode patent. State whether or not it is situated west of north?

A. Yes, it is north-west.

Q. But not west?

A. Not west; no; it is northwest.

Q. And what is the distance between the Spring discovery and the discovery of the Uhlig No. 2?

A. 665 feet.

Q. The location notice calls for about 700; so that it would be within the distance, and would be west of north?

A. Yes sir.

Re-cross examination.

By Judge STREET:

Q. The point you have marked discovery of Uhlig No. 2, in the direction from the Spring Lode discovery, is considerably nearer northerly than westerly?

A. Well, it is nearer a northerly direction than westerly; but it would be northwesterly.

Q. It wouldn't be a true northwest?

A. No, sir; it wouldn't be true northwest.

Q. It would be a point nearer north than half way between true northwest and north?

A. If you speak of true courses—yes sir. Magnetic courses, it is a question.

Q. It wouldn't be as far westerly as northwest on the magnetic course, would it?

A. I think on the magnetic course it would be much nearer northwest than northerly.

Q. Your arrow is the true north?

A. Yes, sir; it is the true north. The variation is about 17 degrees.

Q. In what class of topography is the discovery of the Uhlig No. 2 located. What class of ground is there around there, as you have marked it on the map?

A. I think most of the ground around there——

155 Q. (Interrupting.) I ask you at the discovery?

A. I am not positive.

Q. Is it not in a little hollow where you have marked it, and not on the ridge at all?

A. I don't remember. I think it is on the slope. It is on the easterly slope from this ridge.

Q. Have you your notes with you?

A. Yes sir.

Q. Do they indicate the character of the topography immediately surrounding the discovery of the Uhlig No. 2?

A. No, sir; they just mentioned the open cut.

Q. In carrying your line for patent through to the ridge did you survey the topography?

A. Where there are any marked features—yes sir.

Q. Do you make any topographical memoranda?

A. Yes sir; where there is any distinct gulch, I note it.

Q. What topographical memoranda did you make respecting the discovery of the Uhlig No. 2 in your notes?

A. All I noted is the open cut.

Q. That is all?

A. Yes sir.

Q. Did you make any topographical reference with respect to it—referring to anything else?

A. All I have noted in regard to the discovery of the Uhlig No. 2 is from the point where the ground is broken—an open cut 4 feet wide by 10 feet long, by 8 feet deep at the face; bears north 85 degrees and 32 minutes west, and the discovery of the Uhlig No. 2 bears south 62 degrees and 48 minutes west 18 3/10ths feet.

Q. On your map which you prepared to post on the ground and to file with the application for patent, you carried out this ridge, didn't you?

A. I think I did.

156 Q. And you showed generally the topographical features?

A. Yes sir.

Q. On the ridge?

A. Yes sir.

Q. Who suggested that you should leave them off on this map?

A. I don't think anybody did.

Q. And the Revere gulch—you put that on?

A. I placed it on here with pencil.

Q. Dosn't the ground from the top of the ridge—doesn't it slope quite rapidly at points before it reached the point marked discovery of Uhlig No. 2?

A. From the top of the ridge, the ridge passes down around here some place (indicating same on map); to the point up here the slope would be rapid; but from the point along here on the side line it would not. I think, going over from the Spring discovery from the top of the ridge, between the Spring discovery and the discovery of the Uhlig No. 2, the top of the ridge is not much higher, if any higher, than the discovery of the Uhlig No. 2.

Q. Is there not quite a gulch between those two points—between the Spring discovery and the point you have marked discovery of the Uhlig No. 2—quite a gulch?

A. I think not; no, sir. I don't remember any gulch between those two points. Between the Spring discovery gulch, going from the Spring discovery gulch to the discovery of the Uhlig you pass over the divide or back bone of the hill. I don't think you go through a gulch. The back bone comes here, as shown on your map.

Q. Between the back bone and the discovery isn't there a gulch?

A. Not that I know of.

157 Q. Did you examine to see?

A. Yes, I have been over it many times since then. There may be a very little draw, but there is no gulch, I don't think.

Q. Don't the works you have got there start pretty well down in the gulch, below the ridge—these works (indicating same)?

A. These works are in the gulch. I don't think it heads up much beyond the mouth of the tunnel; it heads up here a little ways. This is just a little sag; no defined gulch.

Q. You indicate at a point marked "8" on the line of the St. Joe tunnel on this map, a rising slope of land, don't you?

A. I have noted a dump.

Q. Does the tunnel run into the rising ground, or flat, level land?

A. It runs into rising land.

Q. Which way does the land rise?

A. This way (indicating) and it is also rising this way (indicating) say from a point here, I don't think it would be any higher, or as high, in reality, as that at the discovery.

Q. You testified that the back bone of the ridge was accurately represented here?

A. As near as I remember. It is not my survey. As near as I remember the ridge is accurately represented.

By Mr. CRITCHLOW:

Q. What is the magnetic variation at Bingham?

A. Well, it is about 17 degrees, or 17 degrees and 30 minutes.

Q. According to your survey, do you remember what the magnetic variation was.

A. I can't tell you. It differs at every point.

Q. Did it differ in this one survey?

A. Yes; every line differs. There may be a little iron, or a piece of iron pipe, or something lying around, which would affect it. It is about 17 degrees, take it as an average, all through there.

158 Q. If the meridian were drawn here for the magnetic instead of the true north, it would run to the east of true north?

A. Yes, sir.

Q. So that if the meridian, the magnetic meridian, were drawn through the Spring discovery, or through the discovery of the Uhlig No. 2, state whether or not it would throw the discovery of the Uhlig No. 2 more westerly than the true north line would throw it—true north meridian?

A. Yes sir.

Q. Some 17 degrees more to the westerly?

A. Yes sir.

Q. It would be 17 degrees more than you gave it before?

A. Yes sir.

Q. State the course magnetic from the Spring to the Uhlig No. 2 discovery, as nearly as you can?

A. It would be northwest. I don't know whether it would be more north than west. It would be about a northwest course.

By Judge STREET:

Q. Didn't you find a so-called location stake at corner No. 3 of the Uhlig No. 1 a considerable distance westerly from the point you have marked "L. C. 3"?

A. Yes sir; I found a point out here. I marked it there in pencil; and the Greek said that this wasn't the location stake out here, but that the oak stake where I had placed the post *t* there on the Uhlig No. 1 was the location corner of the claim.

Q. Didn't you first set the Uhlig No. 1 corner in the matter of the Greek, Nicholas Castro and others, down here what you have marked 3 on here?

A. No sir; I set it there when I made my first survey, and before filing my notes and working them up, I went out and moved
159 it to this point. I filed no map or notes showing that post on the corner.

Q. What is the distance between the corner as you first placed it and the corner as you have now placed it—corner No. 3 of the Uhlig No. 1?

A. About 185 feet.

Q. How did you come to select the former location corner as accurate—the outer one; not the present corner?

A. There was a mound of stones there and a stake, and I was told that was the corner. The Greek was on the ground at the same time, and he said the oak stake was the corner.

Q. Who told you that was the corner?

A. I think——

Q. Was it Mr. Uhlig?

A. I think it was Mr. Gary.

Q. Was he representing Mr. Uhlig at that time, pointing out the stakes to you?

A. I think he was.

Q. You were doing the surveying for Mr. Uhlig, weren't you?

A. I don't know. I don't remember who the order was issued by.

Q. I am requested to ask you whether you or any of your family have any interest in the Uhlig No. 1 or Uhlig No. 2 claims, either directly or indirectly?

A. No, sir; I have no interest in them. I think a brother of mine is interested.

Mr. CRITCHLOW: We submit the location notices.

Judge STREET: We renew our objection to the Uhlig No. 2 lode, and we won't repeat the objection, if your honor recollects it.

The COURT: Have you any objection to the other location notice?

160 Judge STREET: Yes, sir; we object to the Uhlig No. 1 also.

The COURT: The court is of the opinion that the surveyor,

not being personally acquainted with the ground in controversy, independent of the description contained within the location notice, and the statements made to him by other parties as to where the corners were, the court will refuse to admit at the present time the location notices in evidence, unless his testimony is supplemented, and it is shown by other parties that the stakes and monuments he ran were the stakes and monuments of this claim.

Judge STREET: The ruling is upon both? We make the same objection.

The COURT: The same ruling will be made.

Exception by counsel for the defense.

JOHN B. TAYLOR, sworn for the defense.

Examined by Mr. CRITCHLOW?

Q. Where do you live?
A. Bingham.
Q. Your name is John B. Taylor?
A. Yes sir.
Q. How long have you lived there?
A. Since 1886.
Q. What is your business?
A. I follow mining.
Q. How long have you followed that?
A. I followed that since the 70's.
Q. Did you know Edmund H. Uhlig in his lifetime?
A. Yes sir.
Q. Is he dead?
A. Yes, sir.
Q. When did he die?
A. Last November, I think.
Q. How long had you known him prior to his death?
A. Since 1886.
Q. Had you been associated in any way with him in business?
A. Yes sir.
Q. In what way?
A. He and I were in a great many locations together.
161 Q. In what part of Bingham, in a general way, were his locations?
A. He had some in Saint's Rest gulch, and some on Clipper hill.
Q. Are you acquainted with the Uhlig No. 1 and the Uhlig No. 2?
A. Yes sir.
Q. Since when?
A. Since the 2nd day of January, 1889.
Q. Where were you at that time?
A. I was on the ground on the 2nd day of January, 1889.

Q. Where was Mr. Uhlig at that time and on the 1st of January, 1889, if you know?

A. On the 1st of January?

(Judge STREET:)

Q. Do you know this of your own knowledge?

A. Yes, he was on the ground of the night of the 31st of December—on the ground now located as the Uhlig No. 1 and Uhlig No. 2.

(Mr. CRITCHLOW:)

Q. Where was his place of residence at that time?

A. The greater portion of the time he was living on Clipper hill.

Q. Is that in Bingham?

A. Yes sir.

Q. At what distance from these claims?

A. About two miles and a half.

Q. On the night of the 31st of December, 1888, where was he living? Do you know?

A. He was on this ground known as the Uhlig ground.

Q. Did he have a cabin there?

A. He had a little dug out there.

Q. Was he living there?

A. Yes, he stopped there that night.

Q. Where were you stopping?

A. On Clipper hill.

Q. You have stated that he was on the ground on the 1st of January. State how you know?

A. I came down the hill with him.

162 Q. What hill?

A. Clipper hill; down on the divide there and then he went to the little old dugout. I saw him and another man go on the ground. This was on December 31st, 1888.

Q. Did he state what his purpose was in going to the cabin?

Objected to as incompetent and hearsay?

Objection sustained.

Mr. CRITCHLOW: We take an exception. We offer to show by this witness that at the time Mr. Uhlig left Clipper hill and went to the cabin or dugout upon the Uhlig No. 2 claim on the evening of the 31st of December, 1888, he stated that he was going over there for the purpose of locating the ground now occupied by the Uhlig No. 1 and the Uhlig No. 2 Lode mining claims. That, I presume, comes under your objection, and ruling.

Judge STREET: I insist on the questions being addressed to the witness, so that we can make objections as we go along.

The COURT: Put the questions to him.

(Mr. CRITCHLOW:)

Q. Did Mr. Uhlig state, when he went upon the night of the 31st, the evening of the 31st of December, 1888, from Clipper hill, to this cabin on the Uhlig lode No. 2, as to what his purpose was in going there?

A. Yes sir.

Judge STREET: We think no proper foundation has been laid for this. He has testified simply that he was up on Clipper hill, and Mr. Uhlig started off down the hill in the direction of this so-called dug-out, but this question carries him along to the dug-out, as I understand it. I don't understand that he did go to the dug-out. We object to it because there is no proper foundation laid.

163 Mr. CRITCHLOW: I will submit the question.

The COURT: My recollection is that he answered that he had seen him at or near the dugout.

Mr. CRITCHLOW: He saw him go into the dugout, he said.

Judge STREET: I would like to ask him a question?

(Judge STREET:)

Q. Have you testified, Mr. Taylor, that on December 31st you saw Mr. Uhlig go into the dugout?

A. I saw Mr. Uhlig go to the dugout; I didn't see him go in the dugout.

Q. Where were you when you saw him?

A. On the ridge.

Q. The Clipper Hill ridge?

No response.

Judge STREET: We renew our objection, and make the further objection that it is hearsay and self serving.

The COURT: I think the objection is well taken.

Exception by counsel for the defense.

(Mr. CRITCHLOW:)

Q. State whether or not Mr. Uhlig said, at the time when he left you near the ground and went to the Uhlig No. 2 dugout, or the dugout belonging to him on that claim, that he was going there to the ground to locate the ground which is now occupied by the Uhlig No. 1 and the Uhlig No. 2 claims?

Judge STREET: I object to that as leading, as incompetent and as hearsay. It is leading because it puts into the mouth of the witness what was said, in the first place—suggests what was or may have been said to the witness. If it would be proper under any circumstances, it is improper in this form.

Mr. CRITCHLOW: Your honor has compelled us to ask questions in order to get a record in this case, instead of making an offer to prove. It doesn't come with good grace for him to object

164 to the form of the question when he objects to the offer of proof.

Judge STREET: We have a right to object to the question asked.

The COURT: The question is objected to, and the ground of the objection I assume to be the same as to the previous question, and the same ruling will be made. The court has an impression that the record is quite full on this point and it is no use to repeat the objections every time

Exception by counsel for defense.

(Mr. CRITCHLOW:)

Q. When were you first upon the ground now occupied by the Uhlig No. 1 and the Uhlig No. 2 after that evening when you saw *Mr. Uhlig* go to the dugout on the ground?

A. Second day of January.

Q. At what time of day?

A. About 11 o'clock.

Q. Did you find at that time any evidence of the ground now occupied by these two claims having been recently located. If so, state what they were?

A. I saw the discovery on the Uhlig No. 1 and the discovery on the Uhlig No. 2.

Q. Where was Uhlig at that time?

A. He was in Bingham.

Q. Where, with reference to the discovery, as marked upon Plaintiff's Exhibit A was the discovery of the Uhlig No. 1 as you saw it at that time?

A. I am not conversant with that survey, but approximately speaking I would say——

Judge STREET: We object to that as asking for a conclusion. He can ask where he saw the discovery.

The COURT: He can tell what he saw and what he knows.

165 A. The discovery was approximately about where it is located on that map, as near as I can say. I am not conversant with that survey, therefore I couldn't state definitely as to their surveyed lines.

Q. Do you know a shaft about 4 x 4 feet 45 feet on the east side of Saints Rest gulch, and about 500 or 570 feet northwesterly from the Spring patent?

A. Yes sir.

Q. You know where that is now?

A. Yes sir.

Q. State where with reference to that shaft the discovery was of the Uhlig No. 1 which you saw at that time?

A. It was approximately north.

Q. About how far?

A. Oh, I should say it was in the neighborhood of 50 or 70 feet.

Q. Of which end of the Uhlig No. 1 claim, or where with reference to the location corner stakes of the Uhlig No. 1 claim was the discovery stake that you saw at that time?

Objected to, and question withdrawn.

(Mr. CRITCHLOW:)

Q. I will ask you again: Did you see the location stakes of the Uhlig No. 1 claim on the 2nd day of January?

A. I did.

Q. State as nearly as you can where those different corner stakes were?

A. There was one stake right on the line going up the ridge there from the Spring Lode patent. We used to take that route to go up to the *No You Dont*, following up on the east side of the gulch. They were sitting on a line there, those two stakes were.

Q. Where were the westerly stakes?

A. Over there on the Bear Gulch side.

Q. That is on the west side of the top of the ridge between the gulches?

166 A. Yes, sir; it was quite a good deal further away.

Q. Sat farther westerly?

A. Yes sir.

Q. One of them is now marked as upon the very top of the very crest of the ridge between Saint's Rest gulch and Bear gulches?

A. Yes sir.

Q. Was it further west than that at that time?

A. Yes sir.

Q. And the northwesterly one was further west as well?

A. Yes sir.

Q. Where with reference to these location stakes was the discovery of the Uhlig No. 1 as you saw it at that time?

A. It was approximately near the end line.

Q. Would you be able to state how far from a line drawn between the two location stakes here (indicating)?

A. It would be hard for me to state from that map, because I don't know that survey at all. I haven't been on the ground since the survey was made.

Q. I call your attention to the Uhlig No. 2. Won't you tell us where the cabin or dugout was which you say Uhlig went to on the night of the 31st of December, 1888.

—. I would say it was somewhere very close to the south line there of the Uhlig No. 2, below the arrow there; close to the side line—somewhere in there.

Q. Somewhere south of the Star and near the line between the St. Joe No. 1 and the Uhlig No. 2?

—. Yes, sir.

Q. Whose cabin was that?

A. Mr. Uhlig and myself had occupied it.

Q. For how long?

A. Since 1886, off and on.

167 Q. That would be for two years?

A. Yes sir.

Q. Did you afterwards on the 2nd day of January, or later, than that, see a post or mound or anything there purporting to mark the discovery of the Uhlig No. 2?

A. Yes sir.

Q. Where was that?

A. Just over the ridge on the Revere side, on the northeast.

Q. Between Saint's Rest and Revere gulches?

A. Yes sir.

Q. On the Revere side of the gulch?

A. Yes sir.

Q. How was that discovery marked?

A. There was a post set there, and it was in a pile of rocks.

Q. Did you observe the notice?

A. Yes sir.

Q. Of what claim did it purport to be the notice?

A. It purported to be the location notice of the Uhlig No. 2.

Q. At that time or any other time did you see the location corners of the Uhlig No. 2?

A. Not the northeast corners—no, sir—didn't go to them.

Q. Did you see the corners on the northwest end of the claim? Or the westerly end?

A. Yes sir.

Q. Will you state where those were?

A. They were union corners at that time, and represented the two claims.

Q. That is to say, the corners of the Uhlig No. 1 and the Uhlig No. 2 were identical?

A. Identical.

Q. The northwest corner of the Uhlig No. 2 being the northe-st corner of the Uhlig No. 1.

A. Yes sir.

Q. And the southwest corner of the Uhlig No. 2 being the southeast corner of the Uhlig No. 1.

A. Yes sir.

Q. Did you observe the marking upon the stakes?

A. I noticed there was a mark—Uhlig lode.

Q. What, if anything, in the way of a mineral discovery
168 was there at the discovery of the Uhlig No. 2?

A. At that time on the Uhlig No. 2, the ground was covered with snow.

Q. Later did you see it in that year?

A. Yes sir.

Q. 1889?

A. Yes sir.

Q. Any work done there then?

A. Well, there was quite a little scratching around in different places.

Q. And any showing of mineral bearing rock?

A. Yes sir.

Q. In place?

A. Yes sir.

Q. Bearing what minerals?

A. Well, it was heavily iron stained, and I have had one or two assays that carried 4 or 5 ounces of silver.

Q. Now as to the Uhlig No. 1, what do you say as to mineral there?

Judge STREET: If we can make an admission, we will admit that there are mineral indications in that ground.

Mr. CRITCHLOW: I think if you are satisfied, the Government will be.

Cross-examination.

Examination by Judge STREET:

Q. You say there were union corners; that is, where the Uhlig No. 1 and the Uhlig No. 2 adjoined each other, they had the same corners?

A. Yes, sir; at that time.

Q. Was this about down towards the bottom of the gulch where the Uhlig No. 1 corner was?

A. No, I think it was higher up there.

Q. Was it approximately 300 feet, do you think, from the discovery?

A. I don't know about that. I didn't measure it at all; I couldn't say definitely.

Q. Was the upper corner approximately 300 feet from the discovery?

A. I should judge so; I wouldn't say so definitely.

169 Q. So that, if now the Uhlig No. 2 upper corner, where the two lodes join each other, is 145½ feet from the upper corner of the Uhlig No. 1, it must have been shifted since you saw it?

A. Well, I understand it isn't as it was when I was there. Those claims—one was a continuation of the other originally.

Q. You had not nothing to do with the shifting of the stakes?

A. No, sir.

Q. You say you examined these stakes on January 2, 1889?

A. Yes sir.

Q. Please explain how you happened to go over there, from the discovery of the Uhlig No. 1 down to Saint's Rest gulch, up the ridge and over into Bear gulch, over the ridge between Saint's Rest gulch and Bear gulch, to examine for those two corner stakes?

A. Coming down this ridge—Clipper hill is here—I followed it down here. Mr. Uhlig and I were partners, and he located this ground, and I located some there higher up. Next morning when I came down I wanted to see whether the old gentleman had made the locations properly, and I came down along here and followed the old road down, and then cut across the gulch to find where he had been.

Q. Where did you go?

A. Approximately down through here (indicating same on map).

Q. This way?

A. No; this way (indicating same).

Q. I want to get this on the record. You came southwesterly of the corner of the Uhlig, and farther over to Bear gulch; then you walked approximately along the south side line?

A. No; down here (indicating same).

Q. Entirely south of the Uhlig No. 1 and Uhlig No. 2 claims?

170 A. Yes sir.

Q. Then you went through Saint's Rest gulch?

A. Yes over here, and over to the cabin, and it set somewhere about here; it is approximately about here (indicating place on map).

Q. And Mr. Uhlig wasn't there?

A. No sir.

Q. How long were you there?

A. Probably two hours and a half going around on the hill. I think I got down about half past two o'clock.

Q. Did you go up to these corner stakes?

A. I went up there here and them there (indicating same on map) and went up this ridge, coming down like this, to see whether that discovery had been set over there. I didn't go to those corners (indicating) at all.

Q. Did you read the description?

A. Yes sir.

Q. Did you know where the Spring discovery was?

A. No; not definitely; but about some point in here (indicating same on map). There's a pipe line come from the Spring lode, and we used to conduct water around there. We used to call that the discovery. Whether it was the true discovery or not I couldn't say.

Q. Where is the cabin or Clipper hill with reference to Uhlig No. 1 lode?

A. It was just on the west side of Clipper hill.

Q. In what direction?

A. A little southerly and westerly.

Q. What gulches did you pass in coming down from your cabin on Clipper hill to get to the dugout?

A. I came right over the ridge. Here is the head of Carr fork For instance it would be here. Here comes Muddy fork.

171 Q. All on that south side?

A. Yes sir.

Q. Where did you pass?

A. I came right around the ridge at the head of all the gulches.

Q. How far south of the Uhlig No. 1 lode would that take you?

A. Oh, that would be perhaps three quarters of a mile, may be a mile off, coming on this ridge here.

Q. Tell me how you happened to see corner stake No. 4?

A. Because I was looking for them.
Q. Where did you see it there?
A. I saw it from about 100 feet.
Q. Were you interested in the Uhlig No. 1 lode?
A. Yes sir.
Q. Did you own an interest in it?
A. Yes sir.
Q. Did you ever have it conveyed to you?
A. No.
Q. It wasn't located in your name?
A. No sir.
Q. Do you know where Nicholas Castro lived?
A. Yes sir.
Q. Were you in sight of Castro's cabin when you saw those stakes?
A. Yes, sir; here is his cabin, right about here (indicating locality on map).
Q. In which direction from corner stake No. 3 is Castro's cabin?
A. It would be pretty near southwest.
Q. How near the bottom of Saint's Rest gulch was the corner stake of the Uhlig No. 1—practically down at the bottom of the gulch?
A. Oh, no; quite a ways.
Q. Don't you know that Clipper hill lies northerly?
A. No, sir; I think not.
Q. Is it the ordinary route to pass the old Telegraph mill?
172 A. No, sir; the old wagon road passes around the head of the gulch and came around to the old Jordan mill.

Mr. CRITCHLOW: We renew our offer, if the court please.
Senator BROWN: We offer each of these. We have shown the discovery to be the same here as it is in the description; we have shown now that the survey is within those lines. The fact that the courses might not exactly correspond makes no difference. The general monuments would control the courses. Each one of these descriptions conforms to the description as laid down on the map. My associate says that I should point out whether it has shifted or not. They have been drawn in. That is not a shift, in the sense of that word. It was proper to draw the lines in from where they were. Each of these posts have been drawn in, or some of them.
Mr. CRITCHLOW: The statements of the witness is that the points were identical here (indicating same on map) It is to be assumed, then, that the corner of Uhlig No. 2 was down here; the corner of Uhlig No. 1 was up here. Instead of drawing in the Uhlig No. 2 in the same way that Uhlig No. 1 was drawn in, the Uhlig No. 2 seems to have been thrown up that way and the Uhlig No. 1 drawn down this way. Undoubtedly the claim was too wide.
Judge STREET: I object now to the present offer to place the exhibits in evidence, upon the ground that it has been shown by the

evidence of this witness that either the Uhlig No. 1 or the Uhlig No. 2 lode has been shifted from the original staking upon the ground, and that until an explanation is made of this, as against the Government, and as against the plaintiff in this case these notices are inadmissible; and in support of the objection I will state to your honor that the map shows that each of these claims is a claim for the full width of 600 feet.

173 (Objection argued to the court at length by respective counsel.)

Judge STREET: We also desire to repeat our objection made to the Uhlig No. 2 notice, that the present location of the discovery of the Uhlig No. 2 doesn't correspond to a large degree with the ties in the location notice, and also that the present discovery of the Uhlig No. 1 does not correspond with the ties set forth in the location notice.

The COURT: The court will hold that the boundaries of the claim as indicated by the stakes upon the ground would control the calls in the notice; also, that in so far as the shifting of the boundaries of either one of these claims, and the testimony introduced to show that there was a shifting of the corner monuments or exterior boundaries, there is no evidence of bad faith on the part of the locator in the moving of stakes or boundary lines; there is no injury done to the Government or any prior locator; that he would have the right to make those changes when in fact no one is hurt in the land abandoned; if the boundary lines should be drawn in, the land taken in extra by the extension of the boundary lines being contiguous to the portion actually bounded by the monuments, no harm would be done, and the authorities seem to hold that in the absence of fraud or any infringement upon prior rights, that this might be done. I will overrule the objection to the introduction of the notices on the grounds stated.

Judge STREET: I understand the objections are overruled.

The COURT: Yes, sir.

174 (Marked by reporter as Defendants' Exhibits B. and C, respectively, and read to the court by Mr. Critchlow, as follows:

Uhlig No. 1 lode.

Notice is hereby given that the undersigned has this 1st day of January A. D. 1889 located and claimed this lead lode or vein 1500 linear feet by 600 feet in width being 300 feet on each side of the center of the vein, beginning at this stake and monument and running 1400 feet in a southwesterly direction and 100 feet in a northeasterly direction, with 300 feet on each side of the center of the vein to the extent of this location.

Discovery stake is situated on the south side of Telegraph hill in St. Rest gulch about 300 feet northerly from the north west corner stake of the Spring Lode patent, in West Mountain mining district, Salt Lake county, Utah Territory.

This claim shall be known as the Uhlig No. 1.

EDMUND H. UHLIG, *Locator.*

Filed for record January 1, 1889, at 9:20 o'clock a. m.

JOHN BRUNTON, *Recorder.*

Certificate.

STATE OF UTAH, }
County of Salt Lake, } ss:

I, Thomas Alston county recorder in and for said county do hereby certify that the above and foregoing instrument of writing is a full, true and correct copy of the notice of location of the Uhlig No. 1 Lode mining claim, situated in the West Mountain mining district, Salt Lake county, Utah, as the same appears of record in Book "O" of Locations at page 217, records of Salt Lake county, Utah.

Witness my hand and official seal at Salt Lake City, this eleventh (11th) day of March, A. D. 1901.

THOMAS ALSTON,
Recorder, Salt Lake Co., Utah,
By A. E. CARR, *Deputy.*

(Seal, and 10 cent revenue stamp affixed.)

Uhlig No. 2 lode.

Notice is hereby given that the undersigned has this 1st day of January, A. D. 1889 located and claimed this lead, lode or vein 1500 linear feet by 600 feet in width being 300 feet on each side of the center of the vein. Beginning at this stake and monument and bearing 500 feet in a northeasterly direction and 1000 feet in a southwesterly direction with 300 feet on each side of the center of the vein to the extent of this location. Discovery stake is situated on the ridge between Revere and St. Rest gulches, about 700 feet westerly from discovery stake of the Spring Lode patent in West Mountain mining district Salt Lake county, Utah Territory. This claim shall be known as the Uhlig No. 2.

EDMUND H. UHLIG.

Filed for record January 1st, 1889, at 9:22 o'clock a. m.

JOHN BRUNTON, *Recorder.*

Certificate.

STATE OF UTAH, }
County of Salt Lake, } ss:

I, Thomas Alston, county recorder in and for said county, do hereby certify that the above and foregoing instrument of writing

is a full true and correct copy of the notice of location of the
175 Uhlig No. 2 Lode mining claim, situated in the West Mountain mining district, Salt Lake county, Utah, as the same appears of record in Book "O" of Locations at page 218, records of Salt Lake county Utah.

Witness my hand and official seal at Salt Lake City, this eleventh (11th) day of March, A. D. 1901.

THOMAS ALSTON,
Recorder, Salt Lake Co., Utah,
By A. E. CARR, *Deputy.*

(Seal and 10 cent revenue stamp affixed.)

Mr. CRITCHLOW: It is stipulated between counsel that the St. Joe Mining Company is a corporation organized and existing under the laws of the State of Utah, and has been since the 28th day of October, 1897, and that all of the corporate stock is held by citizens.

Judge STREET: In so far as we can admit the latter fact, we do so. We admit the incorporation, and so far as we can admit the citizenship of the stockholders, we do so.

Mr. CRITCHLOW: I offer in evidence now a deed from Edmund H. Uhlig to the St. Joe Mining Company, dated October 6, 1900, recorded October 30, 1900, in Book "Q" of Mining Deeds, page 530 of the records of the county recorder of Salt Lake county, purporting to convey, for a consideration of $5,333, all the right, title and interest, estate, claim and demand, in possession and expectancy, of the said Uhlig in and to those certain premises, claim and mining right, containing precious metals of gold, silver, and lead and other metals, and situate in the West Mountain mining district, State of Utah, and described as follows: Ninety-nine one hundredths (99/100) of two-thirds (⅔) interest of the "Uhlig No. 1." "Uhlig No. 2, "Ida" and St. Joe No. 1" the location certificates of which said claims being recorded in the office of the recorder for Salt
Lake county, in Book "O" of Locations respectively on pages
176 217, 218, 437 and 323, to which record reference is had for a more particular description, and in the county of Salt Lake, State of Utah. "This deed is intended to convey the balance of my undivided two-thirds interest in said property."

(Received in evidence without objection, and marked by reporter "Def't' Ex. D—J. W. P.")

Mr. CRITCHLOW: We also offer in evidence the certified copy of a deed from Edmund H. Uhlig, of Salt Lake county, Utah, to the St. Joe Mining Company, a corporation, for an undivided one-hundredth part of two-thirds interest in each of the following described lode mining claims, situated in or near Saint Rest gulch, in the West Mountain mining district, Salt Lake county, Utah, to-wit: The Uhlig No. 1, the Uhlig No. 2, and other locations, recorded in the office of the county recorder of said county, in Book "O" of Loca-

tions, on pages 217, 218, 437 and 323, to which record reference is had for a more particular description. This deed is dated December 15, 1898, duly acknowledged, and is recorded in Book "Q" of Mining Deeds, page 258, on December 20th 1898.

(Same received in evidence without objection.)

Dr. R. A. HASBROUCK, recalled by the defense.

Examination by Mr. CRITCHLOW:

Q. You are president of the St. Joe Mining Company?

A. Yes sir.

Q. You have been president how long?

A. Since the incorporation.

Q. State whether or not you are familiar with the work done upon the Uhlig No. 1 and the Uhlig No. 2 Lode mining claims—I mean the assessment claims?

A. Yes sir.

177 Q. For the year 1897?

A. Yes sir.

Q. State whether or not you caused a certificate showing the labor to have been done to be filed in the office of the county recorder of Salt Lake county in that year?

A. Yes, sir. I believe it was made by Mr. Gary.

Q. Were you familiar with it at the time—with the work?

A. Yes sir.

Q. Done in that year?

A. Yes sir.

Q. State whether you have seen that certificate?

A. No, I have never seen that certificate.

Q. State of your own knowledge—state what work was done, of your own knowledge, in the year 1897?

A. In the year 1897 there was some work done at the discovery point of each claim.

Q. What was the value of the work done on the Uhlig No. 1?

A. I think there was about two days' work done on the Uhlig No. 1 proper, and the most of the work was done in a tunnel that is running from the Uhlig No. 2 to the St. Joe lode No. 1. There was about 180 feet of rock work done there—tunnel work; and at the mouth of the tunnel which appears upon the Uhlig No. 2 running towards the Mute No. 1, there was 20 to 40 feet of work done there.

Q. What was the total value of the work done at that time, in 1897, if you know?

Judge STREET: We would like to know what application it is proposed to make of this—if it is proposed to apply this work to either of these tunnels, one running towards the Mute and the other towards the St. Joe.

(Mr. CRITCHLOW:)

Q. At that time what claims were held and worked in common with the Uhlig No. 1 and Uhlig No. 2 lodes?

A. The Mute.

178 Judge STREET: We object to that, as the record shows that the interest of the St. Joe Company in that claim was acquired subsequent to that date.

The COURT: You may show what work was done, the nature and character of it and where done, and its application towards the development of these claims by the owners at the time the work was done.

(Mr. CRITCHLOW:)

Q. Where was work done in the year 1897—at what point?

A. There was work done at the discovery points—at this discovery point of the Uhlig No. 1 and the discovery point of the Uhlig No. 2, and 180 feet of tunnel on this St. Joe tunnel, and about 20 to 30 feet of work done here (indicating) at this time.

Q. That is—what do you call that?

A. At the Uhlig tunnel, the mouth of which lies easterly of the discovery of the Uhlig No. 2. I see this is marked Uhlig No. 2, but in all of our books and all our writings we know it by Uhlig tunnel.

Q. What was the value of the work done at these places you have described in 1897?

A. I think we estimated that at about $6.00 a foot. There was about 200 feet, which would be about $1,200.

Judge STREET: We object to that, and move that it be stricken out.

Mr. CRITCHLOW: That may go out.

(Mr. CRITCHLOW:)

Q. What was about the actual value—in money, in your best judgment?

A. According to my best judgment, I think it cost us about $1200.

Judge STREET: We object to it. He doesn't seem to know anything about the work, or its value.

179 The COURT: I think he may answer. He says he is the president of the company.

A. I have been manager.

The COURT: He has described the work; he knows it has been done.

(Mr. CRITCHLOW:)

Q. It cost you $1200?

A. Yes sir.

Q. State whether or not, in your judgment, that was a reasonable amount to pay for the work which you did at that time?

A. Yes, sir; a reasonable amount.

Q. In the year 1898, will you state what amount was done at that time, and in what year, and at what points?

A. The work in 1898 was all—the most of it was done in this tunnel—Uhlig tunnel.

Q. To what extent?

A. We also built a building here (indicating place of map.)

Q. Where, and to what extent was the work done?

A. In 1898, this tunnel was run from its mouth to this point.

Q. What point is that?

A. To a shaft sunk—at the junction of the main tunnel with this shaft. There was a shaft sunk 14 feet on the vein, and this shaft was run.

Q. A drift southerly from the main tunnel?

A. Yes sir; southwesterly, and I think the tunnel was carried almost to a point, almost to this point on the Mute No. 1.

Q. That would be the south line of the Mute No. 1?

A. Yes, sir; about 600 feet, I think.

Q. What amount of work in dollars and cents was done during that year—1898?

A. Between $4,000 and $6,000 worth of work. There were other improvements besides this tunnel. There was a trail made
180 1300 feet—a 12 per cent. trail; there were trails made over the hill, and a building erected at the mouth of the tunnel to accommodate eight men, and a blacksmith shop.

Q. What do you say as to whether those improvements upon the surface you have mentioned, the trails and these building and shops, tended to reasonably develop the Uhlig No. 2 lode?

A. Yes sir.

Q. In 1899 what work was done and where?

Recess of court until 2 o'clock p. m.

2 O'CLOCK P. M.

Dr. R. A. HASBROUCK, recalled for further direct examination.

By Mr. CRITCHLOW:

Q. In 1899 what work was done upon or for the benefit of the Uhlig No. 2 Lode claim, and where was it done, and to what extent or value?

A. The work was done in the Uhlig tunnel for the Mute No. 1.

Q. Was any work done on this St. Joe tunnel?

A. No work was done there in 1899.

Q. What was the amount of the expenditures in 1899 in the Uhlig tunnel?

A. Between $4,000 and $6,000, I believe.

Q. That was the extension of the tunnel for the purpose of development?

A. Yes sir; and the starting of a draft at about this point here.

Q. At what station—No. 5.

A. Yes.

Q. In which direction?

A. In a southwesterly direction.

Q. I understand you from your testimony that all of the work done on those claims is not shown upon that map?

A. No sir.

181 Q. Do you know whether the surveys for the map were made before the work was done?

A. The work that was done on the ground before we went there is not shown, except some on the St. Joe tunnel. We extended that tunnel. We also did work for those claims below there, on claims that are still farther down the mountain.

Q. In 1900 where was work done on the Uhlig No. 2 claim and to what extent, and what was the nature of the work?

A. The tunnel was extended outside the line of the Uhlig No. 2 claim. The first drift we termed the blacksmith shop drift, and it was extended about 140 feet in a southwesterly direction. We started on the hanging wall of the vein. I can show you the point.

Q. Never mind.

A. Continuing—and run in 285 feet; on the foot wall of that which we term the black vein, we run in on that 40 feet.

Q. What was the total of the expenditures which you made in 1900 in making those developments?

A. Well, the money we spent in 1900 for development work would amount to fully $10,000, but it wasn't all done upon this Uhlig claim.

Q. How much of that was done?

A. On Uhlig No. 2?

Q. Yes.

A. How much?

Q. How much of that was done upon the Uhlig No. 2?

A. Between 2,000 and $3,000.

Q. Won't you state in what direction the vein or veins, if there be more than one, run in the Uhlig No. 2 and in the Uhlig No. 1 claims?

A. The strata veins have a course about northeast and southwest, and dip probably 33 to 40 degrees.

Q. Can you illustrate on the map about where those veins come to the surface?

A. Yes sir.

182 Q. I wish you would do so?

A. We have what is called the St. Joe lead. The croppings will come much about this point and take this course through here.

Q. That would be about the middle and lengthwise of the St. Joe claim, as shown upon that map?

A. Yes sir.

Judge STREET:

Q. And not touch the Uhlig either 1 or 2?

A. I will explain. This vein, while it is cropping here, is opened at the blacksmith shop and further down the hill and in the gulch at this point, and we have the foot wall, after we get in here about 120 feet and get the quartzite foot wall, and the course of it would be in these claims as we have opened them here, about through in a southwesterly direction.

Q. That would be, if I understand you, a little south of the middle line of the Uhlig lode and lengthwise upon the lode and going through the southeast corner of the Uhlig No. 1?

A. Yes sir; should pass through there. It may be a little to the west as we go in on it.

Q. That is, a little towards the west?

A. Yes sir; at this point here, station 15, we get the foot wall, the quartzite foot wall, and run in on that about 40 feet, this same direction, but the hanging wall is right in here; the vein is about 400 feet across it.

Q. In here? You mean northerly in the Uhlig tunnel?

A. Yes sir.

Q. That is quite deep underground?

A. Yes sir.

Q. There you get the hanging wall of the same vein?

A. Of the second vein. This is the first here (indicating).

Q. You get the hanging wall of the vein somewhere just southerly of the northerly side line of the Uhlig No. 2?

183 A. I think it is about pretty close to 400 feet in station 15 before we get to the hanging wall. The outcroppings show at the discovery point of the Uhlig No. 2. The ridge goes around here and back this way pretty well down here, and as you go into the gulch it comes back to this point here (indicating).

Q. As it comes out of the westerly end of the Uhlig No. 2 it goes into the Uhlig No. 1?

A. Yes sir.

Q. And north of the discovery point of the Uhlig No. 1 or where?

A. About the discovery point.

Q. Of the Uhlig No. 1?

A. Yes sir.

Q. And extends on westerly?

A. Yes, sir.

Q. What do you say as a mining man, from your experience in the development of these and other mining claims, as to whether the work which you have described as having been done since 1897 on the Uhlig No. 2 Lode mining claim, tends to reasonably develop the lode or lodes or veins which pass through the Uhlig No. 1?

A. The work is done for that purpose.
Q. I ask you whether it reasonably tends to develop that claim.
A. Yes sir.

Cross examination.

By Judge STREET:

Q. Where does vein No. 2 show at the surface—an outcrop?
A. Well, I don't understand what you have reference to as vein No. 2.
Q. You called it yourself vein No. 2—second vein?
A. The outcrop is at the discovery point of the Uhlig No. 2, and it shows at the discovery point of the Uhlig No. 1.
Q. Where else?
A. And along the Uhlig Lode——
Q. (Interrupting.) Where does it actually show at the surface?
A. The whole distance across the Uhlig No. 2 and across the Uhlig No. 1.
184 Q. Is there any part of it that is covered with debris—wash?
A. There might be a little in the gulch—the Saint's Rest gulch.
Q. Between the discovery point of Uhlig No. 2 and the discovery point of Uhlig No. 1 do I understand you that there is a continuous outcrop of the vein in place?
A. The vein in place; yes, sir.
Q. And continuing on from Uhlig No. 1 how far does that outcrop show on its face?
A. It will show across the Uhlig No. 1.
Q. Where does it pass out of the Uhlig No. 1?
A. It passes out of the Uhlig No. 1 about 200 or 300 feet from the southwesterly corner.
Q. Though the end line?
A. Through the end line—yes, sir.
Q. Does the country rock crop out of the Uhlig No. 1 and the Uhlig No. 2?
A. Yes sir.
Q. Is the line between the country rock and the vein traceable on the surface of the Uhlig No. 1 and the Uhlig No. 2?
A. Yes sir.
Q. What distinguishing characteristic is there between the country rock and the vein as shown at the outcrop?
A. We have a quartzite foot wall and porphyry between the walls.
Q. You consider the porphyry as the vein?
A. The porphyry is the vein matter.
Q. How wide is the vein?
A. The black vein about 400 feet across it between the walls, as cut by the tunnel.
Q. Mineralized all the way through?

A. Yes sir. Our average assay for the 400 feet by hand sample is $5.08 for the distance between the walls.

185 Mr. CRITCHLOW: We want to put in the record for application for patent, which is to be sent down by Mr. Hobbs. It should have been here about half past one. And Mr. Casey has gone up stairs to get the order dismissing, and so on, in the case.

Judge STREET: Will you rest with the exception of that?

Mr. CRITCHLOW: Yes, sir.

Judge STREET: I move to dismiss the counter claim, whatever status the application of the defendant for this ground now occupies, upon the ground that they haven't proven that the ground covered by the Uhlig No. 1 lode and the Uhlig No. 2 lode was vacant, unoccupied public domain at the time the lodes are purported to have been located.

Mr. CRITCHLOW: I think that would be a negative which we wouldn't be called upon to establish. Nobody could do anything more than go upon what is apparently the public domain, not claimed by any body else, not shown here to be claimed by any body else. Of course, the court would presume it was unoccupied public domain; otherwise the locator would be called upon to prove a negative, which he never could do.

The COURT: The parties making application for patent, so far as the testimony shows that they were competent to make the location and did make it, and have published a notice of the application for a patent—which proof, I suppose, will be supplied when it comes in——

Mr. CRITCHLOW: Yes sir.

The COURT: And there being no adverse claim filed, the law assumes that the applicants are entitled to a patent. The ex-

186 amination of the witnesses does not show but what the parties have complied with the law relative to the location and occupation and patenting of lode mining claims, and the objection will be overruled.

Judge STREET: We will note an exception. We prefer to have the other side finish their case before we put on rebuttal evidence.

Mr. CRITCHLOW: We offer in evidence in this case the order of this court made in this case on the 22nd day of November, 1899, as recorded in Minute Book No. 6 of the records of this court, on page 610.

Judge STREET: I take it, it is an antecedent record, and doesn't properly belong here as a matter of evidence at this time?

Mr. CRITCHLOW: We offer it formally as evidence.

Judge STREET: I will withdraw the objection.

Mr. CRITCHLOW: I will read the record for your honor's information. The motion is entitled in this cause (reads)

"The motion to quash the summons heretofore issued and to dismiss the plaintiff's complaint herein, having been heretofore fully

argued and submitted, and the court having duly considered the same, and being fully advised in the premises, it is now ordered that said summons heretofore issued in so far as it may respect the defendant Alexander McKernan be, and the same is, hereby quashed. And it is further ordered that the plaintiff's complaint, in so far as it may respect the defendant Alexander McKernan, be, and the same is hereby dismissed. And it is further ordered that the demurrer to the plaintiff's complaint, in so far as it may relate to the defendant Uhlig, be and the same is hereby overruled."

Mr. CRITCHLOW: Now, with the exception of these patent application papers, we rest.

187 Before doing so, however, and Mr. Street not objecting to our opening the case again for that purpose, we will offer now in evidence certified copies of the affidavits of the parties of labor performed in each of the four years to which the testimony has been directed—1897, 1898, 1899 and 1900. These being affidavits recognized by the law of Utah. They would be in aid of the good faith and possession of the defendant of this ground, and I think would be competent on that score.

Judge STREET: I think, in view of the evidence of Dr. Hasbrouck, these are entirely superfluous. They might be insufficient under the law, but we make no objection to their admission.

(Papers marked by reporter respectively, as Def'ts' Exhibits E. F. G and H. with the initials "J. W. P.")

Judge STREET: We might put Mr. Mayberry on the stand, and let the official records go in afterwards.

188 ANDREW P. MAYBERRY, sworn for the plaintiff, in rebuttal.

Examination by Judge STREET:

Q. Your name is Andrew P. Mayberry?
A. Yes sir.
Q. Where do you live?
A. Bingham.
Q. How long have you lived there?
A. Off and on since '86.
Q. Are you familiar with the ground in the vicinity of the No. You Don't patent?
A. Somewhat.
Q. At one time did you locate a claim there?
A. I located two claims there.
Q. At what time did you locate those claims?
A. January 1st, 1889.
Q. What were the names of the claims you located?
A. The Levi P. and the Veta.
Q. When did you locate the Levi P. claim?

A. When?
Q. As to the time of day?
A. About five minutes past 12, on January 1st, 1889.
Q. Is that five minutes after midnight of December 31st?
A. Yes sir.
Q. 1888?
A. After December, 1888, yes sir.
Q. What did you — with respect to the Levi P. claim?
A. Simply posted a notice and recorded it.
Q. When did you go on the ground?
A. About a quarter to 12, December 31st. 1888.
Q. What kind of a night was it?
A. It was a fairly good night.
Q. Did you see anybody else in the immediate vicinity of where you were?
A. No; only my brother. He was with me.
Q. Did you personally locate the Veta claim?
A. No, sir.
Q. Do you know who did locate it?
A. My brother.
189 Q. Where is the Levi P. claim situated with respect to the No You Don't?
A. On the southerly side of it.
Q. Will you please examine this Plaintiff's Exhibit No. 2 and indicate where the discovery of the Levi P. claim was?
A. I don't know about that map. There is nothing on there that would indicate to me just where that discovery was. There's a bluff; if that was on the map I could tell.

(Senator BROWN:)

Q. There is nothing there to indicate the location of the Levi P.?
A. Not on that map.

(Judge STREET:)

Q. Were you at that time familiar with the ground upon which the Levi P. was located when you went on there?
A. Yes, sir.
Q. Had you seen it before?
A. Yes, sir.
Q. Examined it?
A. Yes, sir; I had been over it.
Q. State whether or not there was mineral bearing rock in place there?
A. There was.
Q. Did you stake the Levi P.?
A. Yes sir.
Q. When did you stake it?
A. In some four or five days I think it was, after making the location.

Q. What stakes did you place on the Levi P.?
A. 4 x 4's.
Q. And at what places?
A. At the corners.
Q. Did you place a stake at your discovery?
A. It was a piece of board that the notice was tacked on.
Q. Where did you place it?
A. At the discovery.
Q. Did you file for record a notice of your location?
A. I did.
Q. I will ask you to examine this document, which we will call for identification Plaintiff's Exhibit X. Do you know whether or not that is a copy?
A. I couldn't say that is word for word, but it is similar. If that is a true copy of what was filed with the recorder, I suppose it is.
190 Q. With what recorder did you file your notice?
A. The district recorder.
Q. West Mountain mining district?
A. I think John Brunton.
Q. Do you recollect what time you filed it with him for record?
A. It probably was half past 1 or 2 o'clock that afternoon, when I came down town.
Q. State whether or not you staked the Levi P. according to the calls of your notice?
A. Did I.
Q. Where did you place the stakes of the Levi P. with reference to the No You Don't?
A. I started at the southwest corner of the No You Don't—made that a common corner for the Levi P. It would be the northwesterly corner of the Levi P. and southwest corner of the No You Don't.
Q. Then where did you place your next stake—what corner of the Levi P.
A. 300 feet down the hill, in a southeasterly direction, more southerly than easterly, I placed another corner, which answered for a corner of the Veta.
Q. You say it answered as a corner for the Veta—common corner for the Levi P and the Veta?
A. Common corner for both.
Q. Did you also assist in staking the Veta?
A. Yes sir.
Q. Where did you place your next corner of the Levi P.?
A. The next corner we placed was a Veta corner. We came down to this——
Q. (Interrupting.) Do you mean 300 feet down the hill?
A. Yes. Or 600 feet, I mean, down the hill.
Q. The next one was a Veta corner?
A. Yes sir.

Q. How far down was that?

191 A. 600 feet beyond the common corner.

Q. Where was the next stake placed?

A. The next stake was this common corner between the Levi P. and the Veta.

Q. What common corner?

A. Between the Levi P. and Veta.

Q. What corner—what place?

A. It was the southeasterly corner of the Levi P. and the northeasterly corner of the Veta.

Q. Where was your next stake placed?

A. Northeast corner of the Levi P.—that corner up there (indicating same on map).

Q. You mean, the most northerly corner of the Levi P., as sketched on this map?

A. Yes sir.

Q. Did you place any other stakes that you know of?

A. We placed a stake on the southeast corner of the Veta.

Q. That is the corner down here, shown on the map—farthest corner towards the southeast of the Veta?

A. Yes sir.

Q. Did you measure the distance between the southeast corner and the southwest corner of the Veta?

A. No.

Q. Did you estimate the distance?

A. We simply run a line, as we thought, between the two claims, a center line.

Q. What distance did you run the line?

A. That line we ran nearly 1700 feet.

Q. What was your object in running it more than 1500 feet?

A. Because if we set our stakes too far out we could be made to draw them in, but we couldn't draw them out.

Q. Did you intend to claim more than 1500 feet?

A. No, sir.

Judge STREET: We offer the location notice of the Levi P.

192 Cross-examination.

By Senator BROWN:

Q. What is your business?

A. Mining.

Q. Any particular branch of mining?

A. Common miner.

Q. Only a common miner?

—. Anything that comes up in the shape of mining.

Q. You don't intend to be an expert miner?

A. No, sir.

Q. Or a mineral surveyor?
A. No, sir.
Q. Do you hold any position with any company?
A. Superintendent.
Q. Of what?
A. United States Mining Company.
Q. Have you ever been an engineer of any kind?
A. No, sir.
Q. Ever been in the habit of measuring your own claims?
A. Why, certainly.
Q. You generally measured them?
A. Yes, sir.
Q. You practiced some engineering in that way?
A. With a tape line; not with an instrument.
Q. Never used a transit?
A. No sir.
Q. Or compass?
A. Yes, used a compass.
Q. You used a pocket compass?
A. Yes sir.
Q. On this night in question, you determined what you intended to do before you went, did you?
A. Pretty much.
Q. Had you been over the ground on purpose so that you could see where you could put your stakes?
A. No, not on purpose to see where I could put my stakes—that is, you mean the stakes of the boundaries?
Q. You hadn't determined where you would put your stakes prior to the night you made your location?
A. Nothing only the discovery point.
Q. Had you determined the spot where you would put your discovery?
193 A. Yes, sir.
Q. When did you determine where you would put your discovery?
A. Some time in December, a few days before the first of the year.
Q. Why did you wait to determine that?
Objected to as irrelevant and immaterial.
A. Because the ground wasn't open for location at that time.
Q. Why wasn't it open?
A. It was owned by Dan Swan and some other parties.
Q. What location?
A. I can't call it at the present time.
Q. It was already located and occupied during the year 1888?
A. If they had performed the work it would be a *bona fide* location.
Q. It was occupied for the year 1888?

A. Yes, sir.

Q. And you anticipated their going out of existence?

A. Yes, sir.

Q. That was the idea?

A. That was the idea exactly.

Q. That is the reason you didn't make the location then and there when you made the discovery?

A. That was the reason.

Q. Of course, this night you couldn't see whether there was mineral in place there or not, could you?

A. No, I don't suppose you could.

Q. Could you? I know I couldn't. I ask you whether you could. There, on that night, in the moonlight. You couldn't tell mineral in place, could you?

A. No; I don't believe I could.

Q. It was only with the view of a prior discovery and the jumping of a prior location that you were there at midnight?

Judge STREET: We object to the word "jumping" as not
194 proper under the circumstances.

The COURT: Oh, I suppose the word jump may go out.

Senator BROWN: I would just as soon use the word relocation, if they think jumping is offensive.

(Senator BROWN:)

Q. I will ask the witness: Is the word "jump" offensive to you?

A. No, sir; not in the least.

Q. Then I will use the word relocate, as not offensive.

A. You can put it either way.

Q. You were there to take the place of somebody whose time you expected to expire?

A. Yes, sir.

Q. Whether you call it jumping or relocating; or whatever it was; and you couldn't at that time discover mineral?

A. Not only from the fact of knowing it was there from seeing it before.

Q. You couldn't at that time discover it, even if you did know. You couldn't see anything at all that night?

A. You could see rock.

Q. Could you see quartz, mineral—any ore?

A. Well, I expected there was mineral there.

Q. You did see mineral in the quartz that night?

A. No, sir; I didn't say so.

Q. You picked it up that night and saw it was quartz and you saw there was mineral in it?

A. No, sir; not that night.

Q. So far as you were concerned, you couldn't and didn't discover it that night, did you?

A. I knew of its existence.

Q. How?
A. As I said.
Q. You had seen it there before?
A. Yes sir.
Q. When had you seen it there before?
A. Because I was looking this particular ground up.
195 Q. When had you seen it there before?
A. Well, it wasn't over a week before the first of the year.
Q. You went up and looked it over?
A. Yes sir.
Q. You can't tell the name of Dan Swan's location?
A. I can't recall it now.
Q. But you were waiting for that?
A. Yes sir.
Q. On this particular night, at that place, you and your brother were there alone, were you? Anybody else?
A. Not that I know of.
Q. Your brother was there?
A. Yes sir.
Q. What time did you arrive at that place?
A. It must have been about a quarter to 12—half past 11 or a quarter to 12.
Q. When you arrived?
A. Yes sir.
Q. You put up a board?
A. Yes sir.
Q. What kind of a board did you put up?
A. Oh, it was a piece of board about 3½ or 4 feet long.
Q. Did you find it there when you went back a few days afterwards?
A. It was there for some time.
Q. How long was it there?
A. I couldn't say.
Q. Was there anything written upon it?
A. There was a notice on it.
Q. Did you take the board with you from down town?
A. No sir.
Q. Where did you get it?
A. I got it at the Telegraph.
Q. Telegraph office. Were you an officer of the Telegraph at that time?
A. No, sir; I stole it.
Q. You stole the board. Where did you get the notice, steal that too?
A. No, I wrote that.
196 Q. When?
A. Down town before I left.
Q. You didn't steal that from any good lawyer. You wrote that out yourself before you went, the day before?

A. That night, before I started out.
Q. But you stole your board, and you went up and stuck the board in at half past 11?
A. Yes sir.
Q. The- you didn't stop to stake your claim?
A. No sir.
Q. You went back to supper?
A. I believe I did have something to eat.
Q. Did you locate the Levi P. before you did the Veta?

(Judge STREET:)

Q. Did you state that you put the board there at half past 11—my attention has been called to the fact that the witness stated that he put the board there at half past 11——

(Senator BROWN:)

Q. Did you locate the Levi P. before you did the Veta?
A. It was located at the same time.

Judge STREET: I am told that the witness so testified. My recollection is not that way, but if he did, I should like to know and have the reporter read the question and answer.

The COURT: Mr. Street is not sure as to what the witness said, and he asks the privilege of reading from the record to correct his recollection.

Question and answer read by reporter, as follows:
"But you stole your board, and you went up and stuck the board in at half past 11?
A. Yes sir.

(Senator BROWN:)

Q. Were you present with your brother at the Veta?
A. No sir.
Q. Not there when he put——
A. (Interrupting.) No, sir.
197 Q. Didn't you go with him over there?
A. Yes sir.
Q. Where did you separate from him?
A. On the hill side right near the Levi P. discovery.
Q. Was he with you at the Levi P.?
A. We both landed there together.
Q. You stood together at the Levi P.?
A. Yes, sir.
Q. But you stood apart at the Veta?
A. I went down there with him.
Q. To the Veta discovery?
A. Yes, sir; showed him where to put his stake.
Q. What hour were you at the Veta discovery?
A. It was between the time——

Q. (Interrupting.) I don't care about between. What hour of the clock were you at the Veta?
A. Just a little before 12.
Q. You parted at the Veta, did you?
A. Yes, sir.
Q. Where did you meet again?
A. When he came back up.
Q. To the Levi P.?
A. Yes sir.
Q. You met on the Levi P.?
A. Yes sir.
Q. That is the place. Did you meet at supper?
A. No sir.
Q. How long were you apart?
A. At what time, do you mean?
Q. You said you parted from him that night when you were out there with him?
A. You have got two dates. Which time do you mean?
Q. That night of the location. Didn't you part with him that night?
A. Yes.
Q. How long were you apart?
A. Well, I don't know. It was several days, if this is the last parting you mean.
198 Q. You parted that night?
A. Yes sir.
Q. You started out—from where did you start?
A. Bingham.
Q. The city?
A. Yes sir.
Q. Where did you start from?
A. My home.
Q. You and he started out together—at what hour in the evening?
A. Somewhere a little after 11.
Q. And you parted in your excursion that night—or did you stay together all night?
A. We parted.
Q. You parted. When did you meet again after the partition?
A. When he came up from the Veta.
Q. You met again that night?
A. Yes sir.
Q. You were together when you came down the hill?
A. Yes sir.
Q. How long were you apart?
A. Probably half to three quarters of an hour.
Q. During what hours was that half or three quarters of an hour?
A. That was about 12 o'clock—around in that neighborhood.
Q. From half past 11 to half past 12 somewhere?
A. Somewhere around there.

Q. You were separated?
A. Yes sir; we were.
Q. At what point did you meet again?
A. After the separation—it was at the Levi P.
Q. Did he also take a board with him?
A. Yes sir.
Q. Both from the Telegraph?
A. Yes sir.
Q. Both notices wrote before you started?
A. I wrote both.
Q. One for him in his name, and one for yourself in your own name?
A. As to that I can't say. I think they were both in my name; I ain't positive.
Q. You didn't do any staking that night?
A. No, sir.
199 Q. You didn't do any surveying?
A. No sir.
Q. When did you stake it?
A. I can't exactly say the date, but it was within the time allowed——
Q. (Interrupting.) No; no; I don't want anything about that. Tell me about the facts.
A. I should say something like four or five or six days—something like that.
Q. And you staked one of the 1700 feet long. Which was that?
A. Both of them.
Q. And you say you measured them in length 1700 feet?
A. Yes sir.
Q. And your object was to cover the 1500?
A. Our object was to cover the 1500.
Q. Which 1500 did you intend to cover—the one to the east or the one to the west?
A. The one on the east.
Q. Why did you put on the extra 200 feet to the west?
A. We had to measure up over the ridge and down, and I put my stakes out so as to make sure that I was not short; that I would still have my 1500 feet.
Q. You knew you were staking 1700 feet?
A. I knew I was staking it out pretty well.
Q. You knew you were staking in 1700 feet?
A. No; I wasn't positive.
Q. Didn't you swear to that?
A. It measured 1700 feet.
Q. Then it wasn't an accident of yours in measuring 1700 feet.
A. We might not have measured it accurately.
Q. Have you measured it since?
A. No sir.
Q. Have you ever seen it measured since?

A. No sir.
Q. Have you been over it since?
A. Yes sir.
Q. Didn't you go and see it surveyed at the time it was surveyed for patent and protest?
200 A. No sir.
Q. Never saw it done?
A. No sir.
Q. Do you know where the stakes stand now?
A. No sir.
Q. You don't know?
A. No sir.
Q. Don't you know that it measures over 2000 feet?
A. No sir.
Q. But you made it enough?
A. I made it enough.
Q. And you intended to make it more than 1500 feet?
A. I intended to have 1500 feet.
Q. And more than 1500 feet. You knew you were going to make it more than 1500.
A. I knew I set my stakes out full 1500 feet.
Q. You knew you were making it 1700 feet?
A. I wasn't positive.
Q. Didn't you swear to Mr. Street that you were making it 1700, and that you knew that?
A. We measured 1700 feet; but let me tell you why we made it that long. We had to go down over a gulch and up over a ridge.
Q. You say you knew you measured out 1700 feet?
A. Yes; I knew we measured out 1700, according to our tally.
Q. There you set your stake. That was the midnight between December 31st 1888, and January 1st, 1889?
A. Sir?
Q. That was between December 31st, 1888, and January 1st, 1889. It was in the night between those two days?
A. We were on the ground in 1888, and we were on the ground in 1889.
Q. It was during that night you were operating?
A. Yes, sir.
Q. And you made your staking four or five days after?
201 A. Something like that.
Q. Where did you get your stakes?
A. Got them of George E. Chandler.
Q. Pay for them?
A. I suppose so; had them charged.
Q. Did you have them marked?
A. Yes sir.
Q. How?
A. With lead pencil.
Q. What?

A. Stating what they were.
Q. What was it they stated. What was the mark on them?
A. Stating the corner.
Q. Stating what corner?
A. Whatever one we set, stating the corner of the Levi P. or Veta. That was all.
Q. Did you yourself put them?
A. Myself and brother.
Q. Went up and measured it and put them in. Every do any work on that ground?
A. Yes sir.
Q. When?
A. 1890.
Q. How much work did you do in the Levi P. in 1890?
A. Done $100 worth of work.
Q. Whereabouts?
A. Why, up on the ridge.
Q. Tunnel, shaft or open cut?
A. We cleaned out an old incline shaft and sunk it down some.
Q. Is that all the work you have done?
A. No sir.
Q. Go on; tell what you did?
A. We ran a couple of open cuts there.
Q. How big, and where did you run them?
A. In 1890—some time during 1890.
Q. Is that the last work you did?
A. No sir.
Q. Go on; tell the work you did?
A. We started a tunnel down on the Revere side of the claim in 1890.

Q. Did you ever do any work after 1890?
202 A. In 1892 A. M. Spooner done some work there.
Q. How much?
A. He drove a tunnel about 125 feet or 130 feet.
Q. After 1892, anybody do any work?
A. Yes sir.
Q. Who and what?
A. In 1896 I paid for work there.
Q. What work did you have done in 1895?
A. Drove a tunnel toward the incline shaft.
Q. On the Levi P.?
A. Yes sir.
Q. How much of a tunnel?
A. I can't say just now. I paid for $100 worth of work at that point.
Q. Is that the last work you did?
A. No.
Q. Go, on; tell what it was?
A. In 1896 I paid for work.

Q. How much?
A. $100 on the Levi P.
Q. To whom?
A. That was to the Stockdale Brothers.
Q. Where was the work done?
A. In this same tunnel.
Q. 1897—any?
A. No sir.
Q. Have you examined that map to see whether that is correct so far as the Levi P. is concerned?
A. I couldn't say whether that is correct or not.
Q. Do you say yes, or no?
A. I can't say whether it is correct or not.
Q. Haven't you been advised about this map?
A. No, sir.
Q. You have not?
A. I never looked at it until I saw it there.
Q. Ain't you interested in this law suit?
A. No, sir.
Q. Wasn't you interested in it yesterday?
—. No, sir.
Q. Not in any way interested in this—in the Yes You Do.
A. No, sir.
203 Q. Never interested in that in any way?
A. In no shape nor form.
Q. No expectation of getting stock?
A. No sir.
Q. You have been busy about it, haven't you.
A. No, sir; any more than I have been considered a witness for the parties.
Q. Subpœna-d here regularly?
A. Yes sir.
Q. Paid your fee?
A. I haven't had a cent yet.
Q. Who has subpœnaed you?
A. Mr. Lavagnino.
Q. Did he promise you your fees?
A. He didn't say.
Q. You took his looks for it?
A. I expect he will pay up; I don't know.
Q. Did he have a subpœna served on you, or did he just ask you?
A. He just sent me a copy—handed me a copy.
Q. Did you ever measure the distance from this point where you put your board notice to the northeast end?
A. Not commencing at the discovery and measuring—no.
Q. You measured the whole distance, but not that part of it?
A. Not that part of it.
Q. How far would it be?

—. I don't know. 800 or 900 feet, I guess.

Q. To the northeast end. And how far to the southwest end?

A. Well, that was short, I think; it was about 700 feet—750, something like that. The long end was to the east.

Q. But you had it 1700 feet long by measurement?

A. Yes sir.

Q. It was 800 feet to the east.

A. 800 or 900 feet to the east.

Q. You say it is 1700 feet measured; that would make it 900 to the east?

A. 800 one way.

Q. And how much the other? You say it is 800 to the west. Isn't that correct?

A. I can't say.

204 Q. Well, I have only your word for it. When you did measure the 1700 feet, didn't you measure along to know which way from the discovery you went, how much each way?

A. We didn't start at the discovery to measure.

Q. Where did you start from?

A. From the west end line.

Q. Measured to the east?

A. Yes sir.

Q. Then you came 1700 feet?

A. Yes sir.

Q. You can't tell how much was to the west and how much to the east of the discovery point?

A. Well I think there was about 750 feet to the west.

Q. And 800 or 900 or 1000——

A. To the east.

Q. I thought you said 800 to 900 to the east a while ago. Didn't you say 800 to 900?

A. I don't think I put it just exactly that way—somewhere in that neighborhood.

Q. 800 to 900, wasn't it? You won't say that wasn't what you stated half a minute ago?

A. Somewhere in that neighborhood.

Judge STREET: In view of the cross-examination, I want to ask a question or two.

Re-direct examination.

By Judge STREET:

Q. You stated that in measuring the 1700 feet you measured up and down, did you not?

A. Through a gulch and up the side hill and down the other side.

Q. Do I understand you that you didn't measure on a level plane?

A. The ground wasn't level—no.

Q. And did you realize at that time that you were entitled to 1500 feet on the level?

A. Yes sir.

Q. Mr. Brown at one time in his questions stated substantially this: That you stole your board and stuck it in at half past 11. Did you stick your discovery board in at half past 11?

205 A. No, sir.

Q. Did you understand his question with respect to that?

A. I didn't understand his question, that I stuck the board in at half past 11.

Q. When did you stick your board in?

A. About five to ten minutes after 12 o'clock.

Judge STREET: We now offer the Levi P. location notice.

Senator BROWN: We object to it as immaterial, and not rebutting. It wouldn't be rebutting unless it met some issue we tendered; it is not material unless it pertains to the ground in controversy. As I understand this—I may be mistaken—this doesn't affect our location at all. It assumes to take in some little part of the land, but doesn't touch the discovery point—although I may be mistaken about that, but I am so told. I am told that it is marked out right there, and that they don't assume that this Levi P. touches the discovery of the Uhlig, either one of them. It doesn't take in the discovery of the Uhlig does it?

Judge STREET: It appears by your map.

Senator BROWN: Well by your map.

Judge STREET: No; the Levi P. doesn't touch the discovery as shown on the map; but it does touch the area in conflict to the entire extent of the area.

(Objection argued to the court at length by respective counsel.)

The COURT: I suggested early in the trial of the case that before the court passed upon the validity of the location notice of the Yes You Do, the whole proceedings in the land office, the adverse claim, be put in evidence, with a view of having the case as an entirety

206 go up before the supreme court, in order that the whole matter might be settled, but the suggestion of the court was not concurred in, and the case is now in its present condition.

The view I take of the law is this: That in this case, it stands now as though the applicants for patent had posted their notice and diagram upon the claims pending patent proceedings for these claims in the land office; that the register, upon the incoming of the proof of posting the notice and map of the claims, published notice of the application of these parties for a patent to these claims; that no adverse claim has been filed, though through the peculiar conditions which have arisen in the trial of this case, the plaintiff, who claims to be the owner of the Yes You Do claim, also claims that he did file an adverse claim to this application for patent but on account of the invalidity of the location notice of the Yes You Do and the reason that the locator of the claim was disqualified,

being a deputy United States mineral surveyor, and couldn't initiate any title by anything he might do with reference to making a location of the Yes You Do, the location notice has been rejected as evidence. Now, that being so, the application for a patent being unchallenged, the assumption of the law is that the applicants are entitled to patent their claims as applied for, and third parties will not be permitted to question the validity of the proceedings to obtain patent, or make any objections, except to show that the applicants for a patent have not complied with the law. The Eureka case, decided in the 4th Sawyer—I don't remember the name of it—commonly known as the Eureka case—in that case Judge Field held that when a party made an application for a patent, any
207 adverse claimant failing to file his adverse claim within the sixty days' period of publication, in which he asserted or, rather, defined, the nature and boundaries and extent of his adverse claim, that he would be held to waive it. And as no adverse claimants are before the court to any part or any portion of the land embraced within the Uhlig No. — and the Uhlig No. 2 claims as surveyed and applied for, I don't think the location notice of any adjoining or conflicting claim could be heard to determine the right of the applicants to a patent in this case. And looking at the law in this way, I will rule out the location notice of the Levi P.

Judge STREET: I wish the record to show that the ruling of the court is made upon section 2326 and the supplemental act of March 3rd, 1881, of the United States Statutes.

The COURT: As to the supplemental act referred to, the court holds that it doesn't apply, for the reason that there is no contest between adverse claimants.

Judge STREET: We note an exception to the ruling.

(Location notice Levi P. marked for identification by reporter, "X—J. W. P.")

208 GEORGE A. SMITH, sworn for the defense.

Examination by Mr. CRITCHLOW:

Q. You are the receiver of the land office in this city?

A. Yes sir.

Q. You have with you the application papers for patent by the St. Joe Mining Company for the Uhlig No. 1 and the Uhlig No. 2 locations?

A. I don't know until I look at them.

Q. Made by Mr. Edmund H. Uhlig?

A. Yes sir.

Q. And Alexander McKernan?

A. Yes, sir; I have the application papers here.

Q. Included in those application papers see if you find an affidavit of citizenship of Edmund H. Uhlig?

A. Yes sir.

Q. This was filed with the other papers, was it, as shown by the file mark of your office?
A. Yes sir.

Mr. CRITCHLOW: We offer this in evidence.
Judge STREET: We object to it as not the best evidence as incompetent. The affidavit is as follows: (reading same.)

"*Affidavit of Citizenship—Naturalized.*

"STATE OF UTAH,
"*County of Salt Lake,* } ss:

"Edmond H. Uhlig, being first duly sworn according to law, on oath deposes and says: he is over the age of 21 years; that he has applied for a patent for the Uhlig Lode No. 1 and the Uhlig Lode No. 2 mining claims situated in West Mountain mining district, county of Salt Lake and State of Utah; that he was born in Germany, in Prussia, in the year 1842, and he is a naturalized citizen of the United States of America; that he took out his final naturalization papers in the district court at Salt Lake City, Utah, on or about the — day of January, 1892, and is now a resident of Bingham Utah.

(Signed) EDMOND H. UHLIG.

Subscribed and sworn to before me this 10th day of August 1898.

L. H. CARR."

With the signature and seal of L. H. Carr, notary public. "Filed August 17, 1898."

Judge STREET: We submit that it is incompetent, there being better proof; that the certificate of naturalization is the best evi-
209 dence.
Senator BROWN: We offer it simply because it falls exactly within the decision of Judge Field in the Hammer against Garfield case. (Citing decision referred to)
The COURT: I understand the rule to be as you contend, and will overrule the objection.
Exception by counsel for plaintiff.
Mr. CRITCHLOW: We offer also the affidavit of citizenship of Alexander McKernan.
Same objection. Same ruling. Exception by plaintiff.
Mr. CRITCHLOW: This is the original, so I will read it into the record. (Reads:)

"*Affidavit of Citizenship—Native Born.*

"STATE OF UTAH, } ss:
County of ——. }

Alexander McKernan, being duly sworn, says: That he is an applicant for patent for the Uhlig Lode No. 1 and Uhlig Lode No. 2 mining claims, situated in the West Mountain mining district, in Salt Lake county, Utah; that he is a native born citizen of the United States, born in the county of Lucas, State of Ohio, in the year 1847, and is now a resident at Salt Lake City, Utah.

(Signed) ALEXANDER McKERNAN.

Subscribed and sworn to before me this 16th day of August, 1898.

F. W. QUINN,
[NOTARIAL SEAL.] *Notary Public.*

The record may show that the last affidavit also comes from the patent application papers produced by Mr. Smith, the receiver of the land office.

Judge STREET: We take an exception. In view of the ruling of the court, we desire to make an offer at this time. I understand the ruling of the court is that we have no standing whatever to prove that the ground occupied or any portion of it occupied by the Uhlig No. 1 and No. 2, was at the time they were located validly possessed by persons holding antecedent valid locations under the mineral laws of the United States.

210 The COURT: Yes sir.

Judge STREET: We offer, in view of the ruling of the court to prove that the Veta Lode claim was located immediately after midnight on the morning of the 1st of January, 1889, by Andrew Mayberry and Charles Mayberry, and that it covered——

The COURT: You may take any steps that you desire to present this whole question for consideration before the supreme court, and the court doesn't rule that you can't do that at all. I am simply announcing my construction of the law upon the facts before the court.

Judge STREET: We will offer to show that the Veta claim was located as I have specified, and that the area staked out and the area occupied by the Veta claim covered the discoveries of both the Uhlig No. 1 and Uhlig No. 2 claims as shown upon the maps filed upon the application for patent in the United States land office, and that this claim was filed for record January 1st, 1889, at 2:15 a. m. at a time antecedent to the filing for record of either the Uhlig No. 1 or the Uhlig No. 2 claims. We also offer to show that the Levi P. claim was filed for record January 1st, 1889, at 2:15 o'clock a. m., and that

the Veta claim was staked out within a reasonable period, and that a discovery of mineral was made—mineral bearing rock in place at the point of discovery stated in the location notice.

The COURT: In other words, you desire to offer proof to show a valid, subsisting location of the Veta at the time that the Uhlig No. 1 and the Uhlig No. 2 were attempted to be located?

Judge STREET: That is the proof that we offer.

211 The COURT: In the position which the court has taken in the admission and rejection of testimony and the construction of the law, the facts might be as you contend, but still having failed to put in your adverse claim within the prescribed period, and defining the extent and boundaries of your claim, so far as these two locations are concerned, the Veta and the Levi P., whatever right the parties may have was waived by failure to properly adverse the application for patent by the defendant.

Judge STREET: The evidence is excluded?

The COURT: Yes, sir.

Judge STREET: We note an exception.

Mr. SONNEDECKER: With the permission of the court, I will, as a friend of the court and on behalf of the Government in view of the evidence produced concerning the Levi P. and Veta locations, offer in evidence the Levi P. and the Veta location notices, in support of the contention that the Uhlig No. 1 and Uhlig No. 2 were not located, at the time they were located, on vacant, unappropriated mineral lands of the United States. I now offer to raise, with the court's permission, on behalf of the Government and as a friend of the court—to raise the question that your honor desired raised.

Mr. CRITCHLOW: We raise the same objection as to its materiality, and the further objection that this court has no jurisdiction to listen to and decide an issue of this kind; that is not a jurisdiction given to this court, the United States not being before it in that sense.

The COURT: I will sustain the objection. I passed on that before, and the court will sustain the objection as now made to the

212 offer, as well coming from the friend of the Government or of the court as from the plaintiff. The idea of the court seems to have been misapprehended by Mr. Sonnedecker. My idea was, in the way I suggested it, to try the case practically upon what might be considered the merits—the patent proceedings, and the so called adverse claim and such proceedings in the land office, and let the question of the validity of the location notice of the Yes You Do come up at the close of the case, in order that all the facts and the questions of law upon the facts might go before the supreme court, so that from the — that court might be able to direct a different judgment from the one that this court might make if the (the supreme court) found that I was wrong in my construction of the laws of Congress applicable to the facts involved. But as that suggestion was not concurred in, of course it cuts no figure in the case now. Mr. Reporter will you read Mr. Sonnedecker's offer.

(Offer of Mr. Sonnedecker, as found on preceding page read by reporter.)

Mr. SONNEDECKER: I think there was something the reporter didn't catch. I intended to say, and did say, as I thought, that I believed Judge Street had accepted both positions, and expected to make the offer both on behalf of the plaintiff and the Government, until your honor ruled on his offer concerning the Levi P. location notice.

Judge STREET: I only desire to act for the plaintiff in this matter. I expressly this morning reserved all my future actions for the plaintiff. I don't want to be considered as appearing for the Government. I appear for the plaintiff.

213 The COURT: Proceed with the case.

Mr. SONNEDECKER: Note an exception.

Judge STREET: From what your honor has said, I don't think there is any case here. As I understand it, your honor substantially ruled that when our location notice of the Yes You Do was ruled out as invalid, we had nothing to do but simply to rest our case and be referred to the land office. We have gone on in a perfectly supernumerary manner. I don't suppose your honor will make a finding that this was a valid location. In view of the ruling, we have no further standing here.

Mr. CRITCHLOW: We rest.

Conclusion.

214 STATE OF UTAH, } ss:
County of Salt Lake, }

I, J. W. Pike, court stenographer of and for the third judicial district court (division No. 1) Salt Lake county, State of Utah, hereby certify that on 25th and 26th days of March, 1901, I reported stenographically all the testimony and proceedings had in the trial of the cause of Giovanni Lavagnino, plaintiff, *v.* Edmund H. Uhlig *et al.*, defendants; and I further certify that the foregoing annexed type written matter, consisting of 136 pages, is a correct transcript from my official stenographic notes of the testimony and proceedings reported by me as aforesaid.

J. W. PIKE,
Court Stenographer Third District Court
(*Division No.* 1), *State of Utah.*

215 *Notice of Location.*

Notice is hereby given, that the undersigned, having complied with the requirements of section 2324 of the Revised Statutes of the United States, and the local laws, customs and regulations of this district, has located fifteen hundred feet in length by 600 feet in width, on this the Yes You Do lode, vein or deposit, bearing gold,

silver and other precious metals situated in West Mountain mining district, Salt Lake county, Utah, the location being described and marked on the ground as follows, to-wit:

Commencing at cor. post No. 1 identical with the south east corner of the No. You Don't lode U. S. lot 99, and running thence north easterly 1500 ft. to cor. No. 2 identical with the north east corner of the No You Don't lode U. S. lot 99; thence southeasterly (600) feet to corner post No. 3; thence southwesterly (600) feet to corner post No. 4; thence northwesterly (600) feet to place of beginning, including all dips, spurs, angles and variations.

This claim is a relocation of the Levi P. claim and is situated on the southeasterly slope of a high mountain ridge and bears south easterly (2.600) feet from the fork of main Bingham canyon and Bear gulch. The discovery is close to a prominent outcrop near the center of this claim. The four corners of this claim are permanently set and marked.

The mining claim above described shall be known as the Yes You Do lode, located this first day of January, 1898.

Names of locators.

J. FEWSON SMITH, JR.

Recorded January 3rd 1898. at 10:21 a. m. at the request of J. Fewson Smith, Jr., Abstracted in Book "G" of Mining Abstracts, page 199.

J. C. JENSEN,
County Recorder,
By AUGUST STEIN, *Deputy.*

(Duly certified.)

(Z—J. W. P.)

216 Entry No. 123,053.

This indenture, made the fifth (5th) day of September in the year of our Lord one thousand eight hundred and ninety-eight, between J. Fewson Smith, Jr., of Salt Lake City, Salt Lake county, Utah, the party of the first part, and G. Lavagnino of the same place, the party of the second part, witnesseth:

That the said party of the first, for and in consideration of the sum of one dollar, of the United States of America, to him in hand paid, by the said party of the second part the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released, and forever quitclaimed, and by these presents does grant, bargain, sell, release, remise and forever quitclaim unto the said party of the second part, and to his heirs and assigns for ever, all the right, title and interest, estate, claim and demand, both in law and in equity, as well in possession as in expectancy, of the said party of the first part, of, in or — that certain portion, claim and mining right, title or property on a certain vein or lode of rock, contain-

ing precious metals of gold, silver and other precious metals and situate in the West Mountain mining district, Salt Lake county, Utah, and described, as follows, to-wit:

Beginning at corner No. 1, identical with the southeast corner of the "No You Don't" lode U. S. lot 99, running thence northeasterly 1500 feet, thence southeasterly 600 feet, thence southwesterly 1500 feet, thence northwesterly 600 feet to corner No. 1 the place of beginning, said claim known as the "Yes You Do" lode.

Together with all the metals, ores, gold and silver bearing quartz rock and earth therein; and all the rights, privileges and franchises thereunto incident, appendant and appurtenant, or therewith
217 usually had and enjoyed, and also all and singular the tenements, hereditaments and appurtenances thereto belonging, and the rents, issues and profits thereof; and also, all the estate, right, title, interest, possession, claim and demand whatsoever, of the said party of the first part, of, in or to the premises, and every part and parcel thereof.

To have and to hold all and singular, the premises, with the appurtenances and privileges thereto belonging, unto the said party of the second part.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

J. FEWSON SMITH, JR. [SEAL.]

Signed, sealed and delivered in the presence of
N. W. SONNEDECKER.

UNITED STATES OF AMERICA.

STATE OF UTAH, } ss:
County of Salt Lake, }

On the 17th day of October, A. D. one thousand eight hundred and ninety-eight, before me, a notary public in and for said Salt Lake county, duly commissioned and qualified, personally appeared the within named J. Fewson Smith, Jr. whose name is subscribed to the foregoing deed of conveyance as grantor therein personally known to me to be the identical person mentioned in, and who executed the same, and duly acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

[SEAL.] ALVIN V. TAYLOR,
Notary Public.

My commission expires Ap'l 3, 1900.

218 Recorded October 17, 1898, at 4:15 o'clock p. m. at request of grantee in Book "Q" of mining deeds, at page 227, records of Salt Lake county, Utah, recording fee paid 1.50. Abstracted G page 199 line 21.

J. C. JENSEN,
County Recorder,
By AUGUST STEIN, *Deputy.*

(Duly certified.)
(J. W. P. Y.)

218½ In the Third Judicial District Court, in and for the County of Salt Lake, State of Utah.

GIOVANNI LAVAGNINO, Plaintiff,
vs.
EDMUND H. UHLIG ET AL., Defendants.

The above and foregoing, together with the exhibits referred to, constitute all the evidence given or offered on the trial of said action.

That thereafter on the 18th day of December, 1901, said court made and filed its findings of fact and conclusions of law herein, and entered its decree herein.

That thereafter, on the 26th day of December, 1901, the plaintiff made and served a motion to set aside the decision of said court herein, and grant a new trial for the following reasons.

1. Insufficiency of the evidence to jusify the decision, and that the decision is against law.

2. Errors in law occurring at the trial, excepted to by the plaintiff.

Said motion was based upon the files and minutes of the court in said cause.

That thereafter, on the 6th day of January, 1902, said court in said cause entered an order denying plaintif-'s said motion for a new trial.

The above and foregoing bill of exceptions having been duly prepared and served upon all the parties hereto, within the time
219 allowed by law, and having been agreed upon by the parties hereto as true and correct, the same is hereby settled, allowed and made of record herein.

Dated this 13th day of April, 1902.

WM. C. HALL, *Judge.*

The above bill of exceptions as prepared is correct, but this stipulation is given without waiving any right to object to the same as not being served settled and filed in time.

PIERCE, CRITCHLOW & BARRETTE,
Attorneys for Defendants.

April 11, 1902.

220 In the Third Judicial District Court in and for the County of Salt Lake, State of Utah.

GIOVANNI LAVAGNINO, Plaintiff,
v.
EDMUND H. UHLIG ET AL., Defendants. } Petition Assigning Errors.

Now comes the plaintiff and appellant in the above entitled action and assigns the following errors for the ground of reversal herein :

Errors in law occurring at the trial and at the time duly excepted to by the appellant.

1. The court erred in rejecting the notice of location of the " Yes You Do " mining claim.

2. The court erred in rejecting the deed conveying said " Yes You Do" mining claim from J. Fewson Smith to G. Lavagnino, the plaintiff.

3. The court erred in refusing to permit the plaintiff to prove that the plaintiff duly filed in the United States land office a protest and adverse claim in respect to the area in conflict between the " Uhlig No. 1 " and the " Uhlig No. 2 " Lode mining claims, and the " Yes You Do " Lode mining claim, and that within thirty days of the time of the filing of the said protest and adverse claim, plaintiff commenced this action in this court to determine the right of possession of the area in conflict between said claims.

4. The court erred in refusing to permit the plaintiff to prove that, at the time the " Uhlig No. 1 " and the " Uhlig No. 2 " claims were located, there was a subsisting, valid location, known as the " Levi P." location, also a further subsisting, valid location, known as the " Veta " location ; and that said " Levi P." location covered all of the area in conflict between the " Yes You Do " and the " Uhlig No. 1 " and the " Uhlig No. 2 " Lode mining claims.

221 5. The court erred in rejecting evidence offered by the plaintiff to show that the necessary annual labor to maintain the said " Levi P." mining claim was performed up to and including the year 1896, and that in the year 1897, previous to the location of the " Yes You Do," the owner of the " Levi P." mining claim abandoned all rights to said claim and failed to perform any labor thereon for the year 1897.

6. The court also erred in refusing to permit the plaintiff to prove that the " Veta " Lode mining claim was a prior location to the " Uhlig No. 1 " and the " Uhlig No. 2 " mining claims—a valid location at the time of the location of the said " Uhlig No. 1 and No. 2 " Lode mining claims, and included the discoveries of each of said claims, the " Uhlig No. 1 " and the " Uhlig No. 2."

7. The court erred in refusing to permit the plaintiff to prove that he had performed the annual labor required by law upon the " Yes You Do " mining claim for the years 1899 and 1900.

8. The court erred in rejecting proof offered by the plaintiff that the title of the "Yes You Do" mining claim had passed from J. Fewson Smith, Jr., to Giovanni Lavagnino, prior to the time of the filing of the protest and adverse claim.

9. The court erred in failing to permit the plaintiff to prove that the plaintiff and his grantor have, since the time of the location of the "Yes You Do" mining claim, complied with the laws and the rules and regulations of the United States, of the State of Utah, and of the West Mountain mining district, so as to entitle the plaintiff to the possession of the "Yes You Do" Lode mining claim, including the conflict area between the "Uhlig No. 1" and the "Uhlig No. 2" and the said "Yes You Do."

10. The court erred in finding that plaintiff introduced no legal or competent evidence upon the trial of this cause to sustain the issues thereof in his behalf.

11. The court erred in dismissing the plaintiff's complaint herein.

12. The court erred in rendering its decision in favor of defendant- and against plaintiff herein.

222 In the Supreme Court of the State of Utah, Regular October Term, October 16, 1902.

GIOVANNI LAVAGNINO, Appellant,
v.
EDMUND H. UHLIG ET AL., Respondents. } Submission.

This cause coming on regularly for hearing was argued by Mr. N. W. Sonnedecker and Hon. C. C. Dey in behalf of the appellant, by Hon. E. B. Critchlow in reply, was submitted, and by the court taken under advisement.

Judgment.

Title of court and cause.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged, that the judgment of the court below be, and the same is hereby, affirmed, with costs.

223 In the Supreme Court of the State of Utah.

GIOVANNI LAVAGNINO, Appellant,
v.
EDMUND H. UHLIG and ALEX. MCKERNAN, Respondents. }

The defendants, Edmund H. Uhlig and Alex. McKernan, on or about the 24th day of August, 1898, made an application in the

United States land office at Salt Lake City, for a patent for the Uhlig No. 1 and Uhlig No. 2, mining claims. The plaintiff, in due time, filed in the said land office, an adverse claim to a portion of the said Uhlig No. 1 and No. 2, which overlapped and included a part of the 'Yes You Do' mining claim. Thereupon further proceedings on said application were stayed in the land office, and the plaintiff in due time instituted this action to determine, as provided in section 2326 of the Revised Statutes of the United States, the right to the possession of the portion of the Uhlig Nos. 1 and 2 which conflicts with the 'Yes You Do.'

It appears from the record that the summons in respect to the defendant Alex. McKernan was quashed, and the action as to him was discontinued; that pending the action, which was not dismissed as to the co-defendant, Edmund H. Uhlig, and before the trial, he conveyed his interest in the Uhlig Nos. 1 and 2 to the St. Joe
224 Mining Company, a corporation, organized under the laws of the State of Utah, and said company was substituted as defendant in place of the said Edmund H. Uhlig. The trial court adjudged and decreed that the St. Joe Mining Company and the said Alex. McKernan are the owners in possession, and entitled to the possession, except as against the paramount title of the United States, of the premises in dispute (which was described in the decree by metes and bounds) and that the defendant recover its costs, etc. From this decree the plaintiff has taken an appeal.

It appears from the testimony of J. Fewson Smith, Jr., a witness for the plaintiff, that he located the 'Yes You Do' on the 1st of January, 1898; that at that time and at the time of the trial he was a deputy United States mineral surveyor "attached to the office of the surveyor general of the district of Utah;" that he had an interest in the litigation; that between the time of making said location and the time of filing the protest in the land office by the plaintiff he agreed with plaintiff to convey to him the 'Yes You Do' mining claim for the consideration of one dollar, and the sum of six hundred dollars, the future payment of which depended upon the conditional stipulations, the substance of which is as follows: If a patent for said claim should be obtained without litigation Lavagnino, the plaintiff, was to pay $600, but if there was litigation through any source, in respect to said claim, and a failure to procure patent for the same, then no part of the $600.00 was to be paid for the conveyance. In case there was such litigation then the said Smith was only to be paid said sum less the expense of patenting the claim, if one should be obtained, but if a patent was only obtained for a small triangle, or part of the claim, the plaintiff might refuse to pay the remainder of the consideration. In pursuance of the foregoing agreement the claim was deeded to the said plaintiff by
225 Smith but the only consideration named therein was the sum of one dollar.

The said Smith also testified that "when he transferred the ground to Lavagnino it was for the purpose of defeating these

other claims and not with a view of making much;" and having further testified that he made the plat showing the conflict in question in this case, he was asked, on cross-examination, the following question: "Isn't it a fact that you being a deputy United States mineral surveyor, couldn't make the survey and protest for your claim if you held it in your own name, and you consequently turned it over to Mr. Lavagnino?"

A. "It is a fact that I couldn't make the protest in my own name while I held an interest in the claim."

After the disclosure of the foregoing facts the plaintiff offered in evidence a certified copy of the location notice of the 'Yes You Do,' and in connection therewith the deed to Lavagnino. To this offer the defendant objected upon the grounds, which in substance, were as follows: That by the testimony of the witness J. Fewson Smith, Jr., it appears that said mining claim was not located by a person who had the power, under the act of Congress, to locate mineral ground, it appearing from the testimony of the witness that he was at the time mentioned, January 1st, 1898, a deputy United States mineral surveyor for Utah, and, therefore, incompetent to make locations; that in this particular action it now appears that the witness, at the time he made the protest map, plat and the survey, fixing the boundaries for the purpose of an adverse claim and protest introduced in the land office, was himself a deputy United States mineral surveyor, interested in the action, as he himself has stated, therefore the location itself was in violation of the law, and could not be the basis either of a valid location in himself or a deed to anybody.

226 The trial court excluded the said notice and deed on the ground that "J. Fewson Smith, Jr., the locator of the claim was prohibited from making the location of a lode mining claim, and therefore had not the qualifications to initiate any title by any act that he did with reference to locating the 'Yes You Do' mining claim. The plaintiff after duly excepting to the ruling of the court rested. The defendant then proceeded to introduce evidence in support of the validity of the Uhlig Nos. 1 and 2 mining claims, after which, in rebuttal, the plaintiff offered to show that the "Levi P." and 'Veta' mining claims, at the time of the location of the Uhlig Nos. 1 and 2, were valid and subsisting claims and covered the discoveries of both the Uhlig No. 1 and No. 2, and were then owned by Andrew P. Mayberry.

Mr. Sonnedecker, an attorney of the plaintiff, offered to make the same showing "on behalf of the Government and as a friend of the court." Defendant's counsel objected to this on the ground that it was immaterial; "that the court was without jurisdiction to listen to and decide an issue of that kind, the United States not being before the court in that sense."

The trial court sustained the objection on the ground that as no adverse claim, based upon the 'Levi P' and 'Veta' claims had been made within the prescribed period, whatever rights the parties may

have had to said claims were waived by failure to properly adverse the application for a patent by the defendant.

It does not appear from the record that any adverse claim, whatever, based upon the 'Levi P' or 'Veta' was made in the land office, in the matter of the defendant's application for a patent of the Uhlig Nos. 1 and 2; nor does the plaintiff claim any interest in said mining claims.

227 After stating the facts, BASKIN, C. J., delivered the opinion of the court.

1. The refusal to permit the certified copy of the location notice of the 'Yes You Do,' and the deed offered in connection therewith, to be introduced in evidence, and the rejection of the evidence relating to the 'Levi P' and 'Veta' mining claims, is assigned as error.

Sec. 452, U. S. Rev. Stat. provides: "The officers, clerks, and employés in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office."

Subsequent to the enactment of this section, sec. 2319 of the U. S. Rev. Stat. was passed, and is as follows:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are not inconsistent with the laws of the United States."

The former section has been retained in all of the revisions of said statutes made since its enactment.

These sections are therefore in *pari materia* and must be construed together, and if possible, made to harmonize and not to violate the general public policy which, it is evident, the former was enacted to prevent. 1 Kent, Comm., (13 ed.) p. 464; Manuel *v.* Manuel, 13 Ohio St. 458, 464–'5.

228 The presumption is that Congress, when the latter section was passed, was aware of the existence of the former, and acted in view of that fact. As the former section has not in terms been repealed, but has been retained in each of the revised editions of the U. S. Statutes it must be presumed that Congress intended it to remain in full force notwithstanding the provisions of the latter section; or, in other words, it was the intention of Congress to prohibit, on the ground of public policy, the officers, clerks, and employees in the General Land Office from acquiring, directly or indirectly, an interest in the purchase from the Government, any of the public land of the United States.

It is clear from the testimony of J. Fewson Smith, Jr., in this case,

that his right to the unpaid consideration for the conveyance of the 'Yes You Do' was wholly dependent upon the purchase or entry, of the same, and to that extent he was interested in the entry, or in the purchase, which is the same as an interest in the entry, sought by Lavagnino. One dollar is the only consideration actually paid by Lavagnino to Smith. Both of the parties at the time anticipated litigation. Smith, in addition to his testimony before referred to, stated: Somebody would have to stand the expense of the litigation if there was any, and since I could not make a sale to Mr. Lavagnino out and out I just let him take it at his own terms with the understanding that if the claim was given to him clear, that is, if there was litigation through any source and he got the claim through for patent clear then I was to receive in addition to what I got that day a certain sum of money. This arrangement was in 1898, between the time of making the location and the time of entering the protest. It would be somewhere about the middle of the summer I should think. I received one dollar in cash. That was to bind the bargain. If he doesn't get the ground I get nothing further."

229 Before making the adverse claim and bringing this suit Lavagnino knew that Smith was a deputy U. S. mineral surveyor, for Smith, as such, made the survey and plat filed in the land office with the adverse claim, so that, if sec. 452 includes deputy mineral surveyors, Lavagnino, before expending any sum except one dollar, was at that time advised of the fact, if he was not before, that his agreement with Smith was in violation of the provisions of said section, and that the conveyance of the 'Yes You Do' for that reason was unvalid.

The latest decisions of the Secretary of the Interior hold that under sec. 452, R. S. U. S., "A deputy mineral surveyor, while holding such office, is disqualified as a mineral entryman."

Floyd *v.* Montgomery, 26 L. D. 122.

Frank A. Maxwell, 29 L. D. 76.

Our attention has not been called to any decision of a court touching the question, and while the decisions of the Land Department, on matters of law, are not binding upon the courts they should not be overruled except when they are clearly erroneous. Hastings & Co. *v.* Whitney, 132 U. S. 357–366 and cases there cited.

We think that the section in question includes mineral surveyors and prohibits them, as held by the Land Department, from entering any of the public lands, while they are such deputies, and also from directly or indirectly, acquiring any interest in the purchase from the Government of the same. It follows, that as J. Fewson Smith, Jr., while he was a deputy mineral surveyor, was prohibited by said section from entering a mining claim or directly or indirectly acquiring any right or interest in the purchase from the Government of such a claim. He was also prohibited at that time from doing any of the acts, upon the performance of which, under the

provisions of the mining law of 1872, the right of making an
230 entry, or purchase from the Government, depends, and that his location of the 'Yes You Do' was therefore void, and Lavagnino acquired no rights under the deed to him of the same.

The failure of the plaintiff to show, in chief, any right to the premises in controversy disclosed the fact that he was "a stranger to the title" of the premises in dispute, and that a non-suit could, on motion, have been properly granted. So that a failure to establish the defendant's claim could in no way benefit him or validate his alleged title to the 'Yes You Do.' Therefore the plaintiff had no more interest in, or right to further contest the defendant's claim, on the ground that the 'Levi P' and 'Vesta' were valid and subsisting claims, than the said Andrew P. Mayberry himself, or any other stranger had.

Sec. 2325, U. S. Rev. Stat. provides that: "If no adverse claim shall have been filed with the register and the receiver of the proper land-office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

In the case of The Eureka Min. Co. *v.* The Richmond, 9 Morrison's Min. Rep. 578 (4 Sawyer, 362), it was held in the opinion delivered by Mr. Justice Field that "Under the mining act of 1872, where one is seeking a patent for his mining location, and gives the prescribed notice, any other claimant of an unpatented location objecting to the patent on account of extent, or form, or because of asserted prior location, must come forward with his objections and present them, or he will be afterwards precluded from object-
231 ing to the issue of the patent."

The rule thus laid down has been adhered to ever since its announcement, both by the courts and the Land Department.

In the case of Wright *v.* Dubois, 21 Fed. Rep. 693–696, Mr. Justice Brewer, in the opinion, summed up the propositions decided therein as follows: "First, the Government, as a land-owner, offers its lands for sale upon certain prescribed conditions, compliance with which is a matter of settlement between the owner and purchaser alone, and with which no stranger to the title can interfere; second, publication of notice is process bringing all adverse claimants into court, and if no adverse claims are presented it is conclusively presumed that none exist, and that no third parties have any rights or equities in the land; third, thereafter the only right or privilege remaining to any third parties is that of protest or objection filed with the Land Department, and cognizable there only."

In Golden Reward Mining Co. *v.* Buxton Min. Co. 79 Fed. 868–874, the same distinguished judge, after quoting sec. 2325 of the Revised Statutes, said: "The expression 'it shall be assumed' must be con-

strued to mean 'conclusively assumed' as any other construction would defeat the object of the statute."

In Burnside *et al. v.* O'Connor *et al.*, 30 L. D. 67–70, Secretary Hitchcock, after quoting the same section said: "The Hibernia having failed to file an adverse claim against the Mary Navin during the latter's period of publication, it must be assumed that no such adverse claim exists, and the department can not now hear any objection from the Hibernia claimants to the issuance of patent for the Mary Navin, based merely on an assertion of prior right to a portion of the land included in the Mary Navin entry. The
232 provisions of the statute are clear, and as the Hibernia claimants have, by their own negligence, placed themselves in such a position relative to the Mary Navin application that it must be assumed they have no adverse claim against said application, it is useless to suspend the Mary Navin entry to await the result of the suit by the Mary Navin against the Hibernia."

In Brauagan *v.* Dulaney, 2 L. D. 744, Secretary Teller said: "It has been the practice of the Land Office not to inquire as to the status of the original or prior location when the discovery is made within the boundaries thereof, unless an application for patent has been made for such original or prior location. If the owner of the original or prior location neglects to adverse the application for a patent to the junior location, it must be assumed, under the provisions of section 2325 of the Revised Statutes, that the claimant of such junior location is entitled to a patent as against the claims of the prior locator."

In the matter of the Nevada lode, 16 L. D., it was held that "A charge of non-compliance with law against a mineral entry, made by a protestant may properly form the basis of a hearing, but the protestant in such a case is not entitled to set up his own claim to the land."

In American Consol. M. & M. Co. *v.* De Witt, 26 L. D. 580, it appears that De Witt made application for a patent for the Maryland mining claim, and that the American Company afterwards protested, and one of the grounds of the protest was that the "Maryland was not a valid location, in that the discovery therein was on the Orbit claim, a prior and subsisting location, and not upon unappropriated public land; that the Orbit vein was the only one discovered within the limits of the Maryland." Secretary Bliss, in ruling
233 adversely to the protestant said: "Whether the ground which includes the Maryland discovery is a part of the Maryland, or a part of the Orbit, and whether the Maryland is the superior claim to the ground in conflict, are questions which were open to determination by adverse proceedings in the local courts and which are now determined adversely to protestant's contention, by reason of its failure to adverse the Maryland's application (section 2325)."

The evident intention of the adverse proceedings, authorized by sec. 2326 of the Revised Statutes, is not to determine any of the rights of the United States, or the rights of the contestants to a

patent; but, in aid of and for the information of the Land Department, to determine, as between the litigants the right to the possession of the mining claim in dispute.

In Doe *v.* Waterloo Min. Co. 70 Fed. 455–462, after quoting sec. 2326 of the Revised Statutes, the court said: "There is no authority in the statute to find against the United States, and that the party so establishing title is entitled to a patent from the United States. The United States is not named as a party. The suit does not purport to be one against the United States. No authority is given by the statute to sue the United States in such a matter. The application for a patent for mineral land is made to the Land Department of the United States. Ultimately that department must determine the right to the patent. The trial of the right to the possession of a given tract of mineral land is a proceeding in aid of that department. It was not intended that when this issue was presented to a court it should operate as a transfer of the whole case made by the application, and that thereafter the Land Department would have nothing to do but to carry into effect the judgment of the court. A State court of general jurisdiction has the power to determine this issue, and such courts are often called upon
234 to try causes arising under the said section 2326. Can it be supposed that it was intended that under the said statute such a court would have the power to determine whether or not the United States should issue a patent to any applicants? The power to sue the United States in a State court should rest upon some positive statute. It can not be inferred from such a statute as the one in question." To the same effect see Wight *v.* Dubois, 21 Fed. 694.

We think it is clear, both from the language of the sections of the Revised Statutes referred to and the authorities cited that it must, as stated by Mr. Justice Brewer, be conclusively presumed that Andrew P. Mayberry, as he failed to make any adverse claim, had none, and as the plaintiff failed to show any right to the disputed premises, he became a stranger to the title, and thereafter had no more right than any other stranger to further contest the defendant's claim. While Mayberry has the right, like any stranger to protest, he cannot do so on the basis of any rights he may have had in either the Levi P. or Veta mining claims. It follows that he conclusively waived his right to do so by failing to file an adverse claim, and that the plaintiff in this case, and all other strangers to the title are likewise precluded from protesting on like grounds.

The trial court found that "On or about the 1st day of January, 1889, one Edmund H. Uhlig, then and there a citizen of the United States, entered upon the unoccupied and unappropriated mineral lands of the United States in West Mountain mining district, Salt Lake county, State of Utah, and having discovered thereon a lode of mineral-bearing rock in place, bearing lead, iron, silver and other minerals, did then and there locate the same as the 'Uhlig No. 1'
and 'Uhlig No. 2' Lode mining claims, by marking the
235 boundaries thereof upon the ground by suitable monuments, so that the boundaries thereof could be readily traced, an- by

posting at the points of discovery upon said mining claims respectively notices of location, describing the same by reference to natural objects and permanent monuments; that thereafter he caused copies of said notices of location, respectively, to be filed and recorded in the office of the district recorder of said West Mountain mining district. That thereafter the said Edmund H. Uhlig, and the defendant, The St. Joe Mining Company, remained in possession of said mining claims, working and developing the same and causing to be done thereon and for the benefit of said claims in each and every year up to and including the year 1900 the annual assessment work required by the laws of the United States."

The application for a patent for the Uhlig No. 1 and 2 was made on August 24, 1898. The 'Yes You Do' was located on the 1st of January, 1898, eight years after the location of the Uhlig No. 1 and 2.

Sec. 2332 Rev. Stat. provides that "Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State and Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property attached prior to the issuance of a patent."

Sec. 2997, subd. 2, Comp. Laws, Utah, 1888, provides that the words "real property as used in the code of civil procedure, unless otherwise apparent from the context, are co-extensive with
236 lands, tenements and hereditaments, water rights, and possessory rights and claims."

The territorial supreme court in Houtz *v.* Gisborn, 1 Utah, 173–176, held that under said section, mining claims are real property and pass by deed.

There are numerous authorities which hold (without regard to statutory provision) that mining claims are real estate.

1 Lindley on Mines, sec. 535.
Barringer & Adams Law of Mining, p. 568 *et seq.*
Aspen Min. & S. Co. *v.* Bucker, 28 Fed. 222, and cases cited.
Harris *v.* Equator Min. Co., 8 Fed. 863.
Hughes *v.* Devlin, 23 Cal. 506.
Roseville Min. Co. *v.* Iowa Min. Co., 15 Col. 29.
McPeters *v.* Pierson, *ibid.* 201.

Sec. 2332 is applicable to lode mining claims.

2 Lindley on Mines, sec. 688.
Harris *v.* Equator Min. Co., 8 Fed. 868.
Altoona Min. Co. *v.* Integral Min. Co., 114 Cal. 100.
Belk *v.* Meagher, 104 U. S. 279–287.

In the last mentioned case (p. 287) after quoting sec. 2332, the court, speaking through Mr. Chief Justice Waite, said: "Under the provisions of the Revised Statutes relied on, Belk could not get a patent for the claim he attempted to locate, unless he secured what is here made the equivalent of a valid location by actually holding and working for the requisite time. If he actually held possession and worked the claim long enough, and kept all others out, his right to a patent would be complete."

In the case in 114 Cal. 105, Mr. Justice Temple, in connection with said section, said: "It must, therefore, follow that where such possession has continued for five years before the adverse right exists, it is equivalent to a location under the laws of Congress." And in support thereof cites Harris *v.* Equator Min. Co. *supra;* Belk *v.* Meagher, *supra* and Anthony *v.* Jilson, 83 Cal. 296.

237 Subd. 2, sec. 2997, Comp. Laws, Utah, 1888, is still in the Revised Statutes of 1898, subd. 10, sec. 2498.

A mining claim being a possessory right, it is real estate under the provisions of the statutes of Utah, before referred to, and any claim which Mayberry might have had, as he failed to institute a suit to recover the same within seven years after the possession of the Uhlig Nos. 1 and 2, as found by the trial court, began, was barred by sec. 2859 of Revised Statutes of Utah, which is as follows: "No action for the recovery of real property, or for the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, grantor, or predecessor was seized or possessed of the property in question within seven years before the commencement of the action." It was also waived by his failure to adverse the application for a patent of the Uhlig Nos. 1 and 2. In view of these facts, the plaintiff, even if J. Fewson Smith, Jr., had not been a deputy U. S. mineral surveyor, as the location of the 'Yes You Do' was not made until eight years after the said possession of the Uhlig Nos. 1 and 2 was begun, could not avail himself of any rights which the said Mayberry may have had.

The objection to the admission in evidence of the certified copy of the notice of location of the 'Yes You Do,' and the deed to Lavagnino, offered in connection therewith, and the objection to the evidence relating to the 'Levi P.' and 'Veta' mining claims were properly sustained.

The decree of the court below is affirmed, with costs.

We concur:—

BARTCH, *J.*
HART, *D. J.*

238 In the Supreme Court of the United States.

GIOVANNI LAVAGNINO, Plaintiff in Error,
vs.
EDMUND H. UHLIG, ALEX. MCKERNAN, & THE ST. JOE MINING Company, a Corporation, Defendants in Error.

Comes now Giovanni Lavagnino, the plaintiff herein and respectfully shows to the court:

1. That on the 16th day of November, 1898, he as plaintiff brought suit against Edmund H. Uhlig and Alex. McKernan as defendants in the third judicial district court of the State of Utah in and for Salt Lake county, claiming to be the owner as against said defendants of the "Yes-You-Do" Lode mining claim, situate in the West Mountain mining district, Salt Lake county, Utah.

2. That on the 7th day of July, 1900, your petitioner as said plaintiff filed in said suit his second amended complaint in which he alleged that he was the owner of said "Yes-You-Do" Lode mining claim, that the defendants had wrongfully caused two certain lode mining claims called the "Uhlig No. 1" and the "Uhlig No. 2" to be located and surveyed for patent so that they overlapped said "Yes-You-Do" Lode mining claim and conflicted therewith, as particularly set forth in said second amended complaint, and alleging that on the 24th day of August, 1898, the defendants filed the field notes and a diagram of said surveys of said "Uhlig No. 1" and "Uhlig No. 2" Lode mining claims and also an application
239 for a United States patent for the same, in the United States land office at Salt Lake City, State of Utah, and caused the register of said land office to give notice of said application for patent by publication as required by law, and praying judgment that the plaintiff be decreed against the said defendants to be the owner, entitled to, and in the possession of the "Yes-You-Do" Lode mining claim including the area in conflict between said "Yes-You-Do" mining claim and the "Uhlig No. 1" and the "Uhlig No. 2" Lode mining claims, and quieting and confirming the plaintiff's title thereto, and for general equitable relief.

3. That on the 21st day of September, 1900, the defendant Edmund H. Uhlig filed his answer to said amended complaint, denying the allegations of said amended complaint and by way of counterclaim against the plaintiff alleged that the said defendant Uhlig on the 1st day of January, 1889 located the said Uhlig No. 1 and Uhlig No. 2 Lode mining claims, describing them, and that thereafter the said Uhlig conveyed to his co-defendant McKernan, an undivided one-third interest in said mining claims, and alleging that the area in conflict between the said mining claims and the Yes-You-Do mining claim belonged to the said defendants as parts of the said Uhlig No. 1 and Uhlig No. 2 Lode mining claims, and that the plaintiff has no right, title or interest in said areas in conflict,

and alleging that the suit had been dismissed as to the defendant McKernan and praying judgment that it be decreed that the plaintiff had no right, title nor interest to any part of the said Uhlig No. 1 or Uhlig No. 2 Lode mining claims; and that the defendant an his co-owner be decreed to be the sole owners and entitled to the possession of the said Uhlig No. 1 and Uhlig No. 2 Lode mining claims.

4. That the said cause came on to be heard before the said
240 court on the 25th day of March, 1901, and upon said hearing it appeared from the undisputed testimony that the said Yes-You-Do Lode mining claim was located on the 1st day of January, 1898, by J. Fewson Smith, Jr., the location under which the plaintiff claimed, and it further appeared that the said J. Fewson Smith, Jr., at the time of the location of said Yes-You-Do Lode mining claim, was a deputy United States mineral surveyor and had been for seven or eight years prior thereto; and thereupon to support his contention the plaintiff offered in evidence the notice of location made by the said J. Fewson Smith, Jr., and a deed from J. Fewson Smith, Jr., to the plaintiff herein, duly executed and delivered after said location, and thereupon the defendant objected to the introduction of the same on the ground that it affirmatively appeared that the location was made by a deputy United States mineral surveyor and that he was prohibited by law from making said location and therefore the location was in violation of law and was not a valid location and could not be the basis of anything to transfer to anybody. And the court thereupon sustained the objection for the reasons stated.

Thereupon the plaintiff offered to prove that within the time prescribed by the Federal statute the plaintiff filed in the United States land office, a proper protest and adverse claim with respect to the area in conflict between the Uhlig No. 1 and the Uhlig No. 2 Lode mining claims and the Yes-You-Do claim, and that within thirty days of the time of filing the protest and adverse claim the plaintiff commenced this action in this court to determine the right of possession of the area in conflict between said claims, and that the plaintiff had performed the annual labor and improvements required by law upon the Yes-You-Do mining claim for the years 1899 and 1900 and that for sometime antecedent to the time that the protest and
adverse claim were filed by the plaintiff in this action in the
241 United States land office the title had passed from J. Fewson Smith, Jr. to the plaintiff herein to the Yes-You-Do mining claim. And further offered to prove that the certified copy of the location notice offered was recorded January 3, 1898 at 10·21 a. m. at the request of said J. Fewson Smith, Jr. in the office of the county recorder of Salt Lake county and is recorded and described in Book G of Mining Abstracts, page 191; and that the plaintiff and his grantor have during the time since the location of this claim complied with all the laws, rules and regulations of the State of Utah and the West Mountain mining district to entitle them to the

possession of the Yes-You-Do mining claim, including the area in conflict between the Uhlig No. 1 and the Uhlig No. 2 Lode mining claims.

To which offer to prove the defendant objected on the ground that it is immaterial, the foundation having fallen and there being no location at all they must go with it, and for the same reasons contained in the objection made to the introduction of the notice of location. Thereupon the court sustained said objection on the ground that the location was void because J. Fewson Smith, Jr. being at the time the location was made by him, a deputy United States mineral surveyor, was not authorized but prohibited by law from making the location, and that the filing of the adverse claim by him in the land office was invalid; and thereupon the plaintiff rested and the defendant thereupon made proof of the title and right of possession of himself and co-defendant to the Uhlig No. 1 and Uhlig No. 2 Lode mining claims; and thereupon the court made findings of fact that the plaintiff had not introduced any competent evidence to sustain the allegations of the complaint or the issues in behalf of the plaintiff, and decree was entered
242 dismissing the plaintiff's complaint.

5. Thereupon in due time your petitioner prosecuted an appeal from the said judgment to the supreme court of the State of Utah and upon the hearing of said cause in the supreme court of Utah it was contended by your petitioner, the appellant therein, that at the time of the location of the Yes-You-Do Lode mining claim, by said J. Fewson Smith, Jr., to wit: on January 1st, 1898, the said J. Fewson Smith, Jr. was not prohibited by the laws and statutes of the United States in force at the time from making the location of said mining claim, because of the fact that he was at the time a deputy United States mineral surveyor, and claimed that under the laws and statutes of the United States the location of the Yes-You-Do Lode mining claim made by J. Fewson Smith, Jr. was a valid location and that the court below erred in holding that the location was void because of the fact that said J. Fewson Smith, Jr. at the time of making the location, to wit: on January 1st, 1898, was a deputy United States mineral surveyor, and your petitioner made no claim to said Yes-You-Do Lode mining claim in the court below or in the supreme court of the State of Utah other than that the location made by J. Fewson Smith, Jr. of said Yes-You-Do Lode mining claim on the 1st day of January, 1898 was a valid location notwithstanding the fact that at the time he was a deputy United States mineral surveyor, and that said Smith had after said location conveyed to him all his interests therein and that he had complied with the laws of the United States, the State of Utah, and the local laws and customs in regard to lode mining claims.

6. That the supreme court of the State of Utah affirmed the judgment of the court below.

243 7. That the supreme court of the State of Utah in deciding said cause and in affirming said judgment expressly held

that under the laws of the United States, Rev. St. U. S. sec. 452, (U. S. Comp. St. 1901, page 257), said J. Fewson Smith, Jr., at the time of making the location of the Yes-You-Do Lode mining claim was prohibited from making said location because he was a deputy United States mineral surveyor and that the location made by him was void and that he acquired thereby no title to or interest in said mining claim so located and that no title to or interest in said mining claim passed to your petitioner the plaintiff in said cause by the deed from the said J. Fewson Smith, Jr., to him, and that the adverse claim to the application for patents to the Uhlig No. 1 and Uhlig No. 2 Lode mining claims filed in the land office by the said plaintiff was invalid because the location made by said J. Fewson Smith Jr. under which he claimed was void, and that therefore the court below did not err in sustaining the objection to and excluding the evidence offered by your petitioner the plaintiff in said cause, which is hereinbefore set forth, and passed upon no other question in said cause.

In this judgment of the supreme court of the State of Utah, this plaintiff is by his counsel advised and verily believes and therefore states that error was committed to his great detriment and injury which will more fully appear from the assignment of errors which is filed with this petition.

Wherefore your petitioner prays that a writ of error may issue in this behalf to the supreme court of the State of Utah for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in the cause duly authenti-
244 cated may be sent to the Supreme Court of the United States.

Dated July 10, 1903.

GIOVANNI LAVAGNINO,
By N. W. SONNEDECKER &
ANDREW HOWAT,
His Attorney-.

245 *Assignment of Errors.*

Now comes Giovanni Lavagnino, petitioner for writ of error to the supreme court of the State of Utah, by N. W. Sonnedecker & Andrew Howat his attorneys and says that the said supreme court of the State of Utah in rendering its decision and judgment in this cause, erred in the following particulars, to wit:

1. The supreme court of the State of Utah erred in holding that the location of the Yes-You-Do Lode mining claim by J. Fewson Smith, Jr., was invalid because said Smith at the time of the location was a deputy United States mineral surveyor.

2. Said court erred in holding that the court below did not err in sustaining the objection of the defendant to the introduction in evidence by the plaintiff of the notice of location of the Yes You Do Lode mining claim by J. Fewson Smith, Jr., upon the ground that

said location was invalid because J. Fewson Smith, Jr., at the time of the location was a deputy United States mineral surveyor.

3. Said court erred in holding that the court below did not err in sustaining the objection of the defendant to the introduction in evidence by the plaintiff of the deed from said J. Fewson Smith, Jr., to the plaintiff Giovanni Lavagnino for said lode mining claim upon the ground that the location of said mining claim by said J. Fewson Smith, Jr., was invalid because he at the time of the location was a deputy United States mineral surveyor and that therefore there was no valid location of said claim by said Smith.

N. W. SONNEDECKER &
ANDREW HOWAT,
Attorneys for Plaintiff in Error.

246 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment which is in the said supreme court of the State of Utah, before you or some of you, being the highest court of law of the said State in which a decision could be had in the said cause between Giovanni Lavagnino as plaintiff, and —— —— as defendants, and where the said Giovanni Lavagnino claimed the title and right to the property in question in said suit under a statute of the United States and the decision of the said supreme court was against the title and right under the statute of the United States claimed by said Giovanni Lavagnino, a manifest error hath happened to the great damage of the said Giovanni Lavagnino as by his complaint appears, we, being willing that error if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ so that you have the same at Washington on the 14" day of September, 1903, in said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error
247 what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 16 day of July, 1903.

[Seal United States Circuit Court, District of Utah.]

JERROLD R. LETCHER,
Clerk of the United States Circuit Court, District of Utah.

Allowed by
ROBERT N. BASKIN,
Chief Justice of the Supreme Court of the State of Utah.

248 UNITED STATES OF AMERICA, *ss:*

To Edmund H. Uhlig, Alexander McKernan, and The St. Joe Mining Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Utah, at Salt Lake City, wherein Giovanni Lavagnino is plaintiff in error, and said Edmund H. Uhlig, Alexander McKernan, and The St. Joe Mining Company, a corporation, are defendants in error, to show cause, if any there be, why the said judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Robert N. Baskin, chief justice of the supreme court of the State of Utah, this 18 day of July, 1903.

ROB'T N. BASKIN,
Chief Justice of the Supreme Court of the State of Utah.

Service accepted & copy received this 18 day of July 1903.

D. H. WENGER AND
PIERCE, CRITCHLOW & BARRETTE,
Attorneys for St. Joe Mining Company.

249 STATE OF UTAH, } *ss:*
County of Salt Lake, }

I, Alexander Gibbons, being duly sworn depose and say; That I am over 21 years of age, and I am not interested in the above entitled suit; that on the 21st day of July, 1903, at Salt Lake City, Utah, I served the citation hereto attached upon D. H. Wenger, attorney for Edmund H. Uhlig and Alexander McKernan, by showing him the original citation and delivering to him a true copy thereof.

ALEXANDER GIBBONS.

Subscribed and sworn to before me this 21st day of July, 1903.

{ Seal of Florence Hartley, Notary Public, Salt Lake County, Utah. Commission Expires June 13, 1906. }

FLORENCE HARTLEY,
Notary Public, Salt Lake County, Utah.

250 STATE OF UTAH, } ss:
County of Salt Lake, }

I, Alexander Gibbons, being duly sworn depose and say; That I am over 21 years of age, and am not interested in the above entitled suit; that on the 22nd day of July, 1903 at Salt Lake City, Utah, I served the citation hereto attached upon Brown & Henderson, attorneys for Edmund H. Uhlig and Alexander McKernan and also at the same time and place served the said citation upon Pierce, Critchlow & Barrette attorneys for the said Edmund H. Uhlig and Alexander McKernan by showing to them the original citation and by delivering to each of them a true copy of the said citation.

ALEXANDER GIBBONS.

Subscribed and sworn to before me this 22nd day of July, 1903.
[Seal of Abial B. Sawyer, Jr., Notary Public, Salt Lake County, Utah.]

ABIAL B. SAWYER, JR.,
Notary Public.

251 In the Supreme Court of the State of Utah.

GIOVANNI LAVAGNINO, Plaintiff in Error,
vs.
EDMUND H. UHLIG, ALEX. MCKERNAN, & THE ST. JOE MINING COMPANY, a Corporation, Defendants in Error.

Know all men by these presents: That we, Giovanni Lavagnino, as principal, and W. S. McCornick and A. Hanauer, of Salt Lake City, State of Utah, as sureties, are held and firmly bound unto the defendants, Edmund H. Uhlig, Alexander McKernan and The St. Joe Mining Company, a corporation, in the full and just sum of three hundred ($300) dollars to be paid to the said defendants, their certain attorneys, administrators, executors or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 15th day of July, in the year of our Lord one thousand, nine hundred and three.

Whereas, lately in the supreme court of the State of Utah, in a suit pending in said court between Giovanni Lavagnino, as plaintiff, and Edmund H. Uhlig, Alexander McKernan, and The St. Joe Mining Company, a corporation, as defendants, judgment was rendered against the said Giovanni Lavagnino, and the said Giovanni Lavagnino having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the
252 aforesaid suit, and a citation directed to the said Edmund H. Uhlig, Alexander McKernan and The St. Joe Mining Company, a corporation, citing and admonishing them to be and appear

at a session of the Supreme Court of the United States, at Washington, on the — day of —— 1903.

Now the condition of the above obligation is such, that if the said Giovanni Lavagnino shall prosecute the said writ of error to effect and answer all damages and costs if he fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

GIOVANNI LAVAGNINO.
W. S. McCORNICK.
A. HANAUER.

Sealed and delivered in the presence of

A. HANAUER, JR.

Approved: July 16, 1903.

ROBERT N. BASKIN, *C. Justice.*

(Copy.)

253 UNITED STATES OF AMERICA.

STATE OF UTAH, } ss:
County of Salt Lake, }

I, Lilburn P. Palmer, clerk of the supreme court of the State of Utah, pursuant to a writ of error allowed in a cause wherein Giovanni Lavagnino, is plaintiff in error, and Edmund H. Uhlig, Alex. McKernan and The St. Joe Mining Company, a corporation, are defendants in error, do return attached hereto a full, true and correct copy of the transcript of record on appeal to the supreme court of said State of Utah, now of record and on file in my office, a copy of the judgment rendered by said court, and the opinion filed therein, together with the original petition for writ of error, assignments of error, writ of error, citation, also a copy of the bond filed herein approved by the chief justice of this court.

In witness whereof I hereunto set my hand and affix the seal of said supreme court this 5th day of September, A. D. 1903.

[Seal Supreme Court, State of Utah, Jan. 4, 1896.]

LILBURN P. PALMER,
Clerk Supreme Court.

Endorsed on cover: File No. 19,075. Utah supreme court. Term No. 120. Giovanni Lavagnino, plaintiff in error, *vs.* Edmund H. Uhlig, Alexander McKernan and The St. Joe Mining Company. Filed September 24", 1903. File No. 19,075.